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2964 No. 15049

United States
Court of Appeals
for the Ninth Circuit

HONOLULU OIL CORPORATION,
Appellant,

vs.

KATHARINE H. KENNEDY and MARK C. ELWORTHY, Executors of the Will of Frank Kennedy, deceased,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —4-26-56

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, Northern District of California, Southern Division

No. 30191

KATHARINE H. KENNEDY and MARK C. ELWORTHY, Executors of the Will of Frank Kennedy, deceased, Plaintiffs,

vs.

HONOLULU OIL CORPORATION, a corporation, Defendant.

COMPLAINT FOR ACCOUNTING

Plaintiffs above named, and each of them, complain of defendant above named, and for first cause of action allege:

I.

That Frank Kennedy died on October 4, 1946; that thereupon such proceedings were duly taken and had in the Superior Court of the State of California, in and for the County of San Mateo, that by an order of said court, duly given and made on November 7, 1946, plaintiffs Katharine H. Kennedy and Mark C. Elworthy, named therein as such, were duly appointed executors of the will of said Frank Kennedy, deceased, and that plaintiffs Katharine H. Kennedy and Mark C. Elworthy thereupon duly qualified as such executors and they, and each of them, ever since have been, and now are, the duly appointed, qualified, and acting executors of the will of Frank Kennedy, deceased; and that thereafter, and on July 7, 1950, the above entitled court

duly gave and made its order permitting plaintiffs Katharine H. Kennedy and Mark C. Elworthy, as such executors of the will of said Frank Kennedy, deceased, to bring this action on behalf of the estate of Frank Kennedy, deceased.

II.

That at all times herein mentioned defendant Honolulu Oil Corporation has been, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware.

III.

That Frank Kennedy was, during his lifetime, and plaintiffs Katharine H. Kennedy and Mark C. Elworthy, and each of them, are, and at all times herein mentioned were, citizens of the State of California; that defendant Honolulu Oil Corporation, is a citizen of the State of Delaware; and that the amount in controversy in this action exceeds $3,000.00, exclusive of interest and costs.

IV.

That on January 6, 1927, Frank Kennedy was the owner, holder, and in possession of:

(a) all that certain lot, piece, or parcel of land situate in the County of Fresno, State of California, bounded and described as follows, to-wit:

The South West Quarter (SW¼) of Section Twenty-two (22), Township Twenty-one (21) South, Range Seventeen (17), East, M.D.B. & M.

(b) U. S. Oil and Gas Prospecting Permit bear-

ing Serial No. Visalia 09551, issued to Thomas M. Crum by the U. S. General Land Office, Department of the Interior, under date of May 28, 1921, and subsequently transferred, by mesne assignments, to Frank Kennedy; which said U. S. Oil and Gas Prospecting Permit was subsequently renumbered "Sacramento 019438", and covered the following described land located in the County of Fresno, State of California, to-wit:

The South half (S½) and the Northwest quarter (NW¼) of Section 18; all of Sections 20, 28 and 30; and the Northeast quarter (NE¼) of Section 32, Township 21 South, Range 17 East, M.D.B. & M., containing 2556.58 acres, more or less.

V.

That on or about January 6, 1927, Frank Kennedy entered into an arrangement of co-adventure with Kettleman Oil Corporation (sometimes referred to herein as Kettleman Oil Corporation, Ltd.) for the exploration, development, and operation of lands owned or controlled by each of them for oil and gas, including the lands of Frank Kennedy referred to in paragraph IV of this complaint; which said arrangement was, and is, embodied primarily in the following documents executed by said co-adventurers in such connection:

(a) On January 6, 1927, Frank Kennedy deeded and transferred to Kettleman Oil Corporation, as his co-tenant, a portion of his right, title, and interest in and to the land described in paragraph IV(a) of this complaint, so that, from and after

said date, Frank Kennedy became, and ever since has been, and his estate now is, a co-adventurer and co-tenant in said lands with Kettleman Oil Corporation and its successors in interest therein; a copy of his said deed, with reservation unto himself, being attached hereto, marked "Exhibit A", and incorporated by reference.

(b) On January 6, 1927, Frank Kennedy assigned to Kettleman Oil Corporation, as his co-tenant, a portion of his right, title, and interest in and to said U. S. Oil and Gas Prospecting Permit referred to in paragraph IV(b) of this complaint, and in and to the lands thereby covered, so that, from and after said date, Frank Kennedy became, and ever since has been, and his estate now is, a co-adventurer and co-tenant in said lands with Kettleman Oil Corporation and its successors in interest therein; a copy of his said assignment, with reservation unto himself "running with the said lands", being attached hereto, marked "Exhibit B", and incorporated by reference;

(c) On January 6, 1927, Frank Kennedy entered into an "overriding royalty agreement" with Kettleman Oil Corporation, which said agreement was amended and supplemented on December 6, 1928, whereunder said Kettleman Oil Corporation sold, assigned, and transferred to Frank Kennedy overriding royalties from all oil and gas produced from lands referred to therein, so that, from and after said date, Frank Kennedy became, and ever since has been, and his estate now is, a co-adventurer in said lands with Kettleman Oil Corporation and its

successors in interest therein; copies of said agreement and supplement thereto being attached hereto, marked "Exhibit C", and "Exhibit D", respectively, and incorporated by reference.

(d) On January 6, 1927, Frank Kennedy entered into an "operating agreement" with Kettleman Oil Corporation wherein and whereunder said Kettleman Oil Corporation, and its successors in interest, as co-adventurer and co-tenant aforesaid, agreed, inter alia, to explore, exploit, and develop the lands covered by said U. S. Oil and Gas Prospecting Permit referred to in paragraphs IV(b) and V(b), supra; a copy of said agreement being attached hereto, marked "Exhibit E" and incorporated by reference.

VI.

That thereafter, and on March 9, 1929, and in furtherance of said arrangement of co-adventure, Kettleman Oil Corporation entered into an agreement with Pacific Western Oil Company, wherein and whereunder Pacific Western Oil Company agreed, as participating co-tenant and co-adventurer, to perform certain of the drilling and other obligations of Kettleman Oil Corporation as co-tenant and co-adventurer with Frank Kennedy; that pursuant thereto Kettleman Oil Corporation made the following transfers, to-wit:

(a) On March 8, 1929, Kettleman Oil Corporation deeded and transferred to Pacific Western Oil Company, as such co-tenant and co-adventurer with Kettleman Oil Corporation and Frank Kennedy, a portion of its right, title, and interest in and to the

land described in paragraph IV(a) of this complaint, so that, from and after said date, Frank Kennedy became, and ever since has been, and his estate now is, a co-adventurer and co-tenant in said lands with Kettleman Oil Corporation and Pacific Western Oil Company and their respective successors in interest therein;

(b) On March 8, 1929, Kettleman Oil Corporation assigned to Pacific Western Oil Company, as such co-tenant and co-adventurer with Kettleman Oil Corporation and Frank Kennedy, a portion of its right, title and interest in and to U. S. Oil and Gas Prospecting Permit "Sacramento 019438", referred to in paragraph IV(b) of this complaint, and in and to the lands thereby covered, so that, from and after said date, Frank Kennedy became, and ever since has been, and his estate now is, a co-adventurer and co-tenant in said lands with Pacific Western Oil Company and its successors in interest therein; a copy of said assignment being attached hereto, marked "Exhibit F" and incorporated by reference.

(c) On March 8, 1929, Kettleman Oil Corporation assigned to Pacific Western Oil Company, as such co-tenant and co-adventurer with Kettleman Oil Corporation and Frank Kennedy, a portion of its right, title, and interest in and to those oil and gas leases and U. S. Oil and Gas Prospecting Permits as to which Frank Kennedy became an overriding royalty owner by virtue of his agreements with Kettleman Oil Corporation described in paragraph V(c) of this complaint (that portion of the U. S. Oil and Gas Prospecting Permit, Serial Num-

ber Visalia 09131, as to which Frank Kennedy had become an overriding royalty owner by virtue of the agreement described in paragraph V(c), having ripened into U. S. Oil and Gas Lease Sacramento 019327(c) bearing date January 7, 1927), so that, from and after said date, Frank Kennedy became, and ever since has been, and his estate now is, a co-adventurer and co-tenant with Pacific Western Oil Company and its successors in interest in the lands covered by said oil and gas leases and U. S. Oil and Gas Prospecting Permits.

VII.

That thereafter, and on March 7, 1935, and in furtherance of said arrangement of co-adventure, Pacific Western Oil Company transferred and assigned its interests acquired from Kettleman Oil Corporation, as described in paragraph VI(a), (b), and (c) of this complaint, to Shell Oil Company, Incorporated, and Kettleman and Inglewood Corporation, so that, from and after said date, Frank Kennedy became, and ever since has been, and his estate now is, a co-adventurer and co-tenant with Shell Oil Company, Incorporated, and Kettleman and Inglewood Corporation, and their successors in interest in those lands in which Pacific Western Oil Company had acquired its co-tenant interest as set out in paragraph VI.

VIII.

That thereafter, and on October 1, 1940, Kettleman Oil Corporation, Ltd. transferred and assigned all of its then remaining interest in those lands

described in paragraph V(a), (b) and (c) of this complaint to Standard Oil Company of Texas and to defendant Honolulu Oil Corporation, as co-tenants and co-adventurers, and Kettleman and Inglewood Corporation transferred and assigned all of its interest in these same lands, acquired as described in paragraph VII of this complaint, to Standard Oil Company of Texas and defendant Honolulu Oil Corporation, as co-tenants and co-adventurers; that thereafter, and on October 1, 1947, Standard Oil Company of Texas transferred and assigned all of its said interest to Standard Oil Company of California, a corporation; so that, from and after said dates, Frank Kennedy became, and ever since has been, and his estate now is, a co-adventurer and co-tenant in said lands with Shell Oil Company, Incorporated, Standard Oil Company of California, and defendant Honolulu Oil Corporation; copies of said transfers and assignments being attached hereto, marked "Exhibit G through Exhibit U", and incorporated by reference.

IX.

That in the case of the lands covered by the U. S. Oil and Gas Prospecting Permits referred to in paragraph VI(b) and (c), and in which Frank Kennedy had reserved a part and was co-adventurer and co-tenant, as aforesaid, such discoveries of oil and gas were made upon said lands as were necessary to enable the issuance of leases upon said permitted lands, and accordingly upon joint application by Kettleman Oil Corporation and Pacific

Western Oil Company to the Department of the Interior of the United States of America for leases on the lands covered by said U. S. Oil and Gas Prospecting Permits, said applications were duly granted so that, inter alia, the United States of America, by and through its Department of the Interior, General Land Office, made, executed, and delivered to Kettleman Oil Corporation and Pacific Western Oil Company its four oil and gas leases as follows:

(a) Lease dated October 4, 1929, and numbered "Sacramento 019438(c)", covering the following lands situate in the State of California, County of Fresno, more particularly described as follows:

The North Half (N½) of Section Twenty-eight (28), Township Twenty-one (21) South, Range Seventeen (17) East, M. D. B. & M.

(b) Lease dated October 4, 1929, and numbered "Sacramento 019438(d)", covering the following lands situate in the State of California, County of Fresno, more particularly described as follows:

The Northeast Quarter (NE¼) of Section Twenty (20), Lots One (1) and Two (2) and the East Half of the Northwest Quarter (E½ of NW¼) and the Northeast Quarter (NE¼) of Section Thirty (30), and the North Half of the Northeast Quarter (N½NE¼) of Section Thirty-two (32), all in Township Twenty-one (21) South, Range Seventeen (17) East, M. D. B. & M.

(c) Lease dated December 16, 1929, and numbered "Sacramento 019696(c)", covering the following lands situate in the State of California, in

part in the County of Kings and in part in the County of Fresno, more particularly described as follows:

The Southwest quarter of the Northeast quarter (SW¼NE¼); the Northwest quarter (NW¼); and the West Half of the Southwest Quarter (W½ SW¼) of Section Thirty-four (34), Township Twenty-one (21) South, Range Seventeen (17) East, M. D. B. & M.

(d) Lease dated December 16, 1929, and numbered "Sacramento 019696(d)", covering the following lands situate in the State of California, in part in the County of Kings and in part in the County of Fresno, more particularly described as follows:

The Northwest Quarter of the Northeast Quarter (NW¼NE¼) of Section Thirty-four (34), Township Twenty-one (21) South, Range Seventeen (17) East, and the Northeast Quarter (NE¼) of Section Eight (8), and the North Half of the Northwest Quarter (N½NW¼) of Section Fourteen (14), Township Twenty-two (22) South, Range Seventeen (17) East, M. D. B. & M.

which said leases were substantially in the form attached hereto marked "Exhibit V" and "Exhibit W", respectively; and that the area embracing said lands and lands adjacent thereto in the general zone of discovery was and is generally known, and is hereinafter referred to as the "North Dome Kettleman Hills Field." That said leases are still in full force and effect, and that Frank Kennedy was, and his estate now is, a co-adventurer and co-tenant therein and thereunder, and in the lands covered thereby

and in the oil and gas produced therefrom, with Kettleman Oil Corporation and Pacific Western Oil Company and their aforesaid successors in interest.

X.

That on or about July 25, 1929, and subsequent thereto, defendant (or its predecessors in interest) and other permittees, lessees, and owners of lands in the North Dome Kettleman Hills Field and the Secretary of the Interior jointly entered into an agreement, accepted and approved by the Department of the Interior on November 22, 1929, regulating, controlling, and governing the development and production of oil and gas in the North Dome Kettleman Hills Field; and a copy of the form of said unit conservation agreement is attached hereto, marked "Exhibit X", and incorporated by reference.

XI.

That thereafter, and after said U. S. Oil and Gas Prospecting Permit had ripened into leases, as aforesaid, and on or about January 31, 1931, defendant (or its predecessors in interest) and the other lessees, owners, and persons entitled to produce oil and gas from the lands in the North Dome Kettleman Hills Field entered into a unit plan agreement for the unified development and production of oil, gas and other hydrocarbons from said North Dome of the Kettleman Hills Field under which they pooled their respective lands and interests in consideration of being entitled to participate in all oil and gas produced from the pooled lands

and interests in proportion to the land and interest contributed by each of them; that in and by said unit plan agreement it was agreed, inter alia:

(a) that all operations for the production of oil, gas, and other hydrocarbon substances in the North Dome Kettleman Hills Field, should be conducted and administered by Kettleman North Dome Association, a non-profit corporation whereof defendant, or its predecessors in interest, and said lessees, owners, and persons entitled to produce oil and gas from the North Dome Kettleman Hills Field were and are members;

(b) that any oil, gas, or other hydrocarbon substances produced by said Kettleman North Dome Association from any part of said North Dome Kettleman Hills Field within the producing limits thereof, as from time to time determined by the board of directors of Kettleman North Dome Association in accordance with said agreement, should be allocated between defendant, or its predecessors in interest, and the other parties to said agreement, their successors and assigns, in the proportion that the area within said producing limits from which they were and are respectively entitled to produce oil, gas, and other hydrocarbon substances bore or bears to the total area within said producing limits; and

(c) that said unit plan agreement was and is made subject to, and that said Kettleman North Dome Association shall perform, all obligations under the leases and/or operating agreements of the member parties signatory, and such members, in-

cluding defendant (and its predecessors in interest), agreed to fully discharge their obligations thereunder; and that thereby defendant, either directly or through its predecessors in interest, agreed to fully pay and discharge its aforesaid obligations to its co-tenant and co-adventurer, Frank Kennedy;

and that copies of the articles of incorporation, of the form of the by-laws of said Kettleman North Dome Association, and of the form of said unit plan agreement, with approvals thereof and consents required thereto, are attached hereto, marked "Exhibit "Y", and incorporated by reference.

That Frank Kennedy, as co-adventurer and co-tenant with Kettleman Oil Corporation and Pacific Western Oil Company, and as owner of his said reserved interests and title to a portion of the lands in which Kettleman Oil Corporation and Pacific Western Oil Company were interested, as aforesaid, and as co-tenant in the oil and gas produced therefrom, was requested by Kettleman Oil Corporation and Pacific Western Oil Company to, and did, join in said unit plan agreement, and did consent that Kettleman Oil Corporation and Pacific Western Oil Company and their successors in interest, become members of said Kettleman North Dome Association and so pool their and Frank Kennedy's lands and interests in its unit plan and operation; and in consideration of his said consent Kettleman Oil Corporation and Pacific Western Oil Company for themselves, and their successors and assigns, covenanted and agreed to pay to Frank Kennedy, and

to plaintiffs and his estate, the same part of the oil, gas, and other hydrocarbon substances (or, if not taken in kind, the same percentage of the value of the oil, gas, and other hydrocarbon substances) produced and allocated to Kettleman Oil Corporation and Pacific Western Oil Company, their successors and assigns, by Kettleman North Dome Association by reason of its right to produce oil, gas and other hydrocarbon substances from the lands in which Kettleman Oil Corporation, Pacific Western Oil Company, and Frank Kennedy were co-tenants and co-adventurers, as aforesaid, which Frank Kennedy would be entitled to receive, and plaintiffs are now entitled to receive, had the oil, gas, or other hydrocarbon substances so allocated been produced from said lands; that copies of said consents and agreements by Frank Kennedy, dated February 13, 1931, are attached hereto, marked "Exhibit Z" and "Exhibit AA", and incorporated by reference; and that pursuant thereto Kettleman Oil Corporation and Pacific Western Oil Company became, and their aforesaid successors in interest, (including defendant) now are, members of Kettleman North Dome Association and parties to its unit plan agreement for the mutual benefit and account of themselves and Frank Kennedy and his estate as co-tenants and co-adventurers.

XII.

That by reason of the foregoing, Kettleman Oil Corporation and Pacific Western Oil Company were, and their successors in interest (including defendant) now are, co-adventurers and co-tenants

with Frank Kennedy and plaintiffs in the lands, among others, covered by those oil and gas leases and U. S. Oil and Gas Prospecting Permits referred to in paragraphs VI(b) and (c)—which said U. S. Oil and Gas Prospecting Permits resulted in the issuance of U. S. Oil and Gas Leases as described in paragraph IX—and in the oil, gas, and other hydrocarbon substances therein and produced therefrom; and Frank Kennedy and plaintiffs, as such co-adventurer and co-tenant with Kettleman Oil Corporation and Pacific Western Oil Company, and their respective successors in interest (including defendant), in said lands and the production therefrom have at all times herein mentioned been, and now are, the owners of:

(a) A reservation and royalty, from the lands covered by U. S. Oil and Gas Lease numbered "Sacramento 019438(c)" and described in paragraph IX(a), supra, of:

(1) Five per cent of all oil produced and saved therefrom, (or, when not taken in kind by Frank Kennedy or plaintiffs, an amount equal in value to five per cent of all oil produced and saved therefrom); and

(2) Five per cent of the net proceeds remaining from the sale of gas, dry gas, and casinghead gasoline produced and sold therefrom (after deducting the cost of manufacturing and marketing the same).

(b) A reservation and royalty, from the lands covered by U. S. Oil and Gas Lease numbered "Sacramento 019438(d)", and described in paragraph IX(b), supra, of:

(1) Three per cent of all oil produced and saved therefrom, (or, when not taken in kind by Frank Kennedy or plaintiffs, an amount equal in value to three per cent of all oil produced and saved therefrom); and

(2) Three per cent of the net proceeds remaining from the sale of gas, dry gas, and casinghead gasoline produced and sold therefrom (after deducting the cost of manufacturing and marketing the same);

(c) An overriding royalty, from the lands covered by:

(1) portions of the oil and gas lease entered into on the 30th day of December, 1926, between Marland Oil Company of California, as Lessor, and Kettleman Oil Corporation, as Lessee;

(2) U. S. Oil and Gas Lease numbered "Sacramento 019327(e), derived from U. S. Oil and Gas Prospecting Permit, Serial Number "Visalia 09131";

(3) U. S. Oil and Gas Leases numbered "Sacramento 019696(c)" and "Sacramento 019696(d)", derived from U. S. Oil and Gas Prospecting Permit Serial Number Visalia 010337;

as set out in the overriding royalty agreement and supplement thereto and described in paragraph V(c), supra, of:

(1) An amount equal in value to two per cent of all oil produced and saved therefrom; and

(2) An amount equal in value to four per cent of the net proceeds remaining from the sale of gas, dry gas, and casinghead gasoline produced and sold

therefrom (after deducting the cost of manufacturing and marketing the same);

and that by reason of said unit plan agreement, referred to in the preceding paragraph, Frank Kennedy and plaintiffs are the owners of, and entitled to, the same reserved and royalty shares of all oil, gas, and other hydrocarbon substances produced by Kettleman North Dome Association and allocated to Kettleman Oil Corporation and Pacific Western Oil Company, and their successors in interest (including defendant) by reason of the inclusion of such co-tenancy leased lands in the producing area under said unit plan agreement as Frank Kennedy and plaintiffs own and are entitled to receive were such oil, gas, or other hydrocarbon substances produced directly from said co-tenancy leased lands, aforesaid.

XIII.

That continuously since the formation of said Kettleman North Dome Association and the execution of said unit plan agreement, said Kettleman North Dome Association has produced and still produces oil and gas from the portion of the field located within the producing limits thereof as determined in accordance with the provisions of said agreement; and that said Kettleman North Dome Association allocated to Kettleman Oil Corporation and to Pacific Western Oil Company a portion of the oil and gas so produced by reason of the right of Kettleman Oil Corporation, Pacific Western Oil Company, and Frank Kennedy, as co-tenants, to

produce oil and gas from the lands covered by those oil and gas leases described in paragraph XII, and that said Kettleman North Dome Association now allocates to defendant, as one of the successors in interest of Kettleman Oil Corporation and Pacific Wetern Oil Company, a portion of the oil and gas so produced by reason of the right of defendant, as one of the successors in interest of Kettleman Oil Corporation and Pacific Western Oil Company, and Frank Kennedy (and his estate), as co-tenants and co-adventurers to produce oil and gas from the lands described in said oil and gas leases.

XIV.

That from the time of the execution of said unit plan agreement Kettleman Oil Corporation and Pacific Western Oil Company and/or their successors in interest, including defendant, have extracted or caused to be extracted casinghead gasoline from the gas allocated to them as alleged in the next preceding paragraph.

XV.

That Frank Kennedy and plaintiffs have at all times herein mentioned elected to take the shares and royalties reserved to Frank Kennedy in money rather than in kind, and, accordingly, during the period commencing with the production and allocation of oil and gas to Kettleman Oil Corporation and Pacific Western Oil Company, as aforesaid, and continuing until the present time, defendant, and its predecessors in interest, have from time to time

made payments to Frank Kennedy (and, upon his death, to plaintiffs) purporting to be payments of the true value of plaintiff's (Frank Kennedy's) share of the oil produced and saved and the gas produced and sold by Kettleman North Dome Association and/or defendant, and its predecessors in interest, during the period covered by such payments; that the correctness or incorrectness of said payments could or can be ascertained only from facts known to defendant, and its predecessors in interest, and unknown to Frank Kennedy and plaintiffs; that Frank Kennedy at all times, and until the early part of 1940, reposed and had the greatest trust and confidence in defendant's predecessors in interest, his co-adventurers and co-tenants, and in their representations that such payments were correct, upon which representations he relied.

XVI.

That on or about July 10, 1939, the United States of America, as plaintiff, filed an action in the District Court of the United States, in and for the Southern District of California, Central Division, against Kettleman North Dome Association, defendant, and other of its lessees, in the North Dome Kettleman Hills Field, as defendants, charging, inter alia, that said defendant lessees had failed to pay the United States of America, as lessor, the full royalties to which it was entitled because, inter alia, they had paid royalties based upon a "posted price" for oil which was less than the true value of such oil at the time of its production; that the United

States of America, as lessor under the U. S. Oil and Gas Leases numbered "Sacramento 019438(c)", "Sacramento 019438(d)", "Sacramento 019327(e)„' "Sacramento 019696(c)", and "Sacramento 019696(d)", aforesaid, thereafter and on March 30, 1946, recovered judgment against defendant lessees for such deficiency in royalties paid by them; and such judgment is now under appeal.

That Frank Kennedy subsequently learned of the filing of such action by the United States of America and of the question raised therein as to the propriety of the royalty payments made by defendant; that this was the first intimation to Frank Kennedy that defendant, and its predecessors in interest, were not, and had not, fully, truly, and correctly accounted to Frank Kennedy for the true value of his reserved and royalty share of the oil produced and saved from the leases and land wherein he and defendant, and its predecessors in interest, were co-adventurers and co-tenants, aforesaid; and that thereupon Frank Kennedy insisted that such basis was not correct and did not constitute payment to Frank Kennedy of the true value of his reserved and royalty share of the oil, gas, and other hydrocarbon substances produced and saved therefrom; and that Frank Kennedy demanded, and plaintiffs now demand, that defendant fully and truly account for, and pay, the true value of his said reserved and royalty share, but that defendant has failed and neglected so to do.

XVII.

That subsequently, by an agreement dated January 1, 1940:

(a) Kettleman Oil Corporation, Ltd., Pacific Western Oil Company, and Kettleman and Inglewood Corporation, the predecessors in interest of Standard Oil Company of California, and defendant Honolulu Oil Corporation; and

(b) Shell Oil Company, Incorporated;

agreed in writing with Frank Kennedy that in computing the running of any statute of limitations on any claim which Frank Kennedy might make against any of them for underpayment of overriding royalties on the production allocated to them by the Kettleman North Dome Association with respect to those lands in which Frank Kennedy had an interest, as set out in paragraphs IV and V, Supra, the period commencing January 1, 1940, and ending with the final determination of that certain action entitled "United States of America vs. General Petroleum Corporation of California, et al." and numbered 467-C in the records of the District Court of the United States in and for the Southern District of California, Central Division, should be excluded; a copy of said agreement being attached hereto, marked "Exhibit BB", and incorporated by reference.

XVIII.

That defendant, having become, by transfers described in paragraphs VI, VII, and VIII, a cotenant and co-adventurer with Frank Kennedy (and plaintiffs) in those lands and interests embodied

in the original arrangement of co-adventure between Frank Kennedy and Kettleman Oil Corporation described in paragraph V, and having become a member of Kettleman North Dome Association, has, by virtue of Article XI of the Kettleman North Dome Association Unit Plan Agreement, described in paragraph XI, supra, assumed all of the obligations of its predecessors in interest under said unit plan agreement including the obligation to pay to Frank Kennedy (and now to plaintiffs) his rightful share of the oil produced and saved and the gas produced and sold by Kettleman North Dome Association and/or the members thereof; and that, in such connection, inter alia, Standard Oil Company of Texas and defendant Honolulu Oil Corporation executed a specific written assumption of all obligations under the Kettleman North Dome Unit Plan with respect to the lands and leases assigned to them, including the lands and leases of Frank Kennedy, as aforesaid, a copy of the form of such assumption of obligations being hereto attached, marked "Exhibit CC" and incorporated by reference.

XIX.

That all of said agreements of co-adventure and co-tenancy, hereinabove referred to, by which defendant now holds and maintains its position and ownership in Kettleman North Dome Association and in the oil, gas, and other hydrocarbon substances produced and allocated from lands in the North Dome Kettleman Hills Field, aforesaid, are still in full force and effect; that defendant has at

no time herein mentioned denied, nor does defendant now deny, the right of Frank Kennedy and plaintiffs to Frank Kennedy's said royalty and reserved share of the oil, gas, and other hydrocarbon substances produced and allocated to defendant under said agreements; and that said co-adventure and co-tenancy is still in existence and has not been terminated.

And as and for a Second, Separate, and Further Cause of Action Against Defendant, Plaintiffs Allege as Follows:

I.

Plaintiffs incorporate herein by reference the allegations of paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, and XIX of plaintiffs' first cause of action as fully as though herein set forth at length.

II.

That by virtue of said agreements wherein and whereby defendant became, and now is, entitled to oil, gas, and other hydrocarbon substances produced from the North Dome Kettleman Hills Field, as aforesaid, Frank Kennedy and plaintiffs became, and now are, co-tenants in ownership of all oil, gas, and other hydrocarbon substances as and when the same are produced and allocated to defendant by Kettleman North Dome Association, and in the proceeds thereof, and plaintiffs are entitled to a full, true, and correct accounting from defendant with respect thereto.

III.

That the royalties and reserved share of Frank Kennedy and plaintiffs in such oil, gas, and other hydrocarbon substances when the same are produced, and in the gasoline, dry gas, and other petroleum products extracted or caused to be extracted by defendant therefrom, can be ascertained only from facts which are within the knowledge of defendant and of which plaintiffs are ignorant, and by means of an accounting ordered by this court; that such accounting involves numerous items and is a complicated one; that in the absence of an accounting and discovery, the royalties and reserved share due plaintiffs cannot be ascertained or determined, and will not be paid by defendant; and that plaintiffs have no adequate or speedy remedy at law.

And as and for a Third, Separate, and Further Cause of Action Against Defendant, Plaintiffs Allege as Follows, to-wit:

I.

Plaintiffs incorporate herein the allegations of paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, and XIX, of plaintiffs' first cause of action as fully as though herein set forth at length.

II.

That at all times herein mentioned, the most confidential relationship existed between Frank Kennedy on the one hand and defendant, or its pre-

decessors in interest, on the other hand, and that, until 1940, as aforesaid, Frank Kennedy reposed the greatest confidence and trust in defendant or its predecessors in interest, and believed that they would deal fairly and justly with Frank Kennedy in all things; that, by reason of Frank Kennedy's reliance upon, and trust, confidence and belief in defendant, or its predecessors in interest, and in their representations that their payments were true and correct, Frank Kennedy accepted said payments under the belief that they were full, true and correct payments for the period which they purported to cover; that by reason of Frank Kennedy's said reliance upon, and trust and confidence in defendant, or its predecessors in interest, and in its aforesaid representations with respect to said periodic payments, Frank Kennedy demanded no other or further accounting from defendant, or its predecessors in interest; and that it was not until the year 1940, when, by reason of the matters hereinabove alleged, Frank Kennedy became uneasy with respect to the correctness and propriety of said payments, that he was first put upon inquiry, and obtained the agreement excluding time from the running of any statute of limitations upon any claim which he might make against defendant, as aforesaid.

III.

That at all times herein mentioned, defendant, or its predecessors in interest, held, and defendant now holds, the lands and leases in which Frank Kennedy and plaintiffs have reserved shares and royal-

ties, as aforesaid, and the oil, gas and other hydrocarbon substances produced therefrom and the proceeds thereof, in trust and as trustee for the benefit and behoof of Frank Kennedy and plaintiffs, and in trust and as trustee to fully account and pay over to Frank Kennedy and plaintiffs the true value of their said reserved shares and royalties therein.

Wherefore, plaintiffs pray that defendant be required to account to plaintiffs for the share or royalties to which plaintiffs are justly entitled on the oil, gas, dry gas, casinghead gas, and other hydrocarbon substances produced and allocated by Kettleman North Dome Association to defendant, and its predecessors in interest, as hereinabove alleged, from March 31, 1931 to date, and that plaintiffs have judgment against defendant for the amounts found due on such accounting, together with interest on such amounts at the legal rate from the respective dates each of such amounts became due, and that plaintiffs be awarded their costs herein and such other and further relief as may be meet and proper in the premises.

/s/ PEDDER, FERGUSON & PEDDER,
Attorneys for Plaintiffs

Duly Verified.

[Endorsed]: Filed November 21, 1950.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Answering the First Cause of Action of the Complaint of plaintiffs herein, defendant admits, denies and avers as follows:

I.

Defendant admits the averments of paragraphs I, II, III, IV and X.

II.

Answering paragraph V defendant admits the execution and delivery on or about the several dates averred in said paragraph of the deed mentioned in subdivision (a), the assignment mentioned in subdivision (b), the overriding royalty agreement mentioned in subdivision (c), and the operating agreement mentioned in subdivision (d), and also the contents and correctness of Exhibits "A" to "E" inclusive, which are attached to the Complaint; but defendant expressly and specifically denies each and every averment in said paragraph which avers that any of or all the documents mentioned therein and copies of which are attached to the Complaint as Exhibits "A" to "E" inclusive created or gave rise to any relationship of co-adventure or co-tenancy between Frank Kennedy or any of the plaintiffs and the defendant, or any of defendant's predecessors in interest; and defendant also expressly denies that any relationship of co-adventure or co-tenancy exists or ever did exist between Frank Kennedy or any of the plaintiffs and the defendant, or any of defendant's predecessors in interest by reason of any

of or all the aforesaid documents, or otherwise or at all.

III.

Answering paragraph VI defendant admits the execution and delivery on or about the several dates averred in said paragraph of the deed mentioned in subdivision (a), the assignment mentioned in subdivisions (b) and (c), and also the contents and correctness of Exhibit "F" which is attached to the Complaint, but defendant expressly and specifically denies each and every averment in said paragraph which avers that any of or all the documents mentioned therein and copies of which are attached to the Complaint as Exhibits "A" to "E" inclusive created or gave rise to any relationship of co-adventure or co-tenancy between Frank Kennedy or any of the plaintiffs and the defendant, or any of defendant's predecessors in interest; and defendant also expressly denies that any relationship of co-adventure or co-tenancy exists or ever did exist between Frank Kennedy or any of the plaintiffs and the defendant, or any of defendant's predecessors in interest by reason of any of or all the aforesaid documents, or otherwise or at all.

IV.

Answering paragraph VII defendant admits the execution and delivery on or about the date averred in said paragraph of the assignment mentioned in said paragraph, but defendant expressly and specifically denies that said assignment was in furtherance of the arrangement of co-adventure mentioned

therein or any arrangement of co-adventure and expressly and specifically denies each and every averment in said paragraph which avers that Frank Kennedy, his estate, or any of the plaintiffs, is or ever was a co-adventurer or co-tenant with Shell Oil Company, Incorporated, Kettleman and Inglewood Corporation, their successors in interest, or defendant herein, and expressly and specifically denies that Frank Kennedy, his estate, or any of the plaintiffs herein now or ever were co-tenants or co-adventurers in any of the lands mentioned therein with Shell Oil Company, Incorporated, Kettleman and Inglewood Corporation, their successors in interest, or defendant herein, and denies that Pacific Western Oil Company acquired any interest in the lands mentioned therein as co-tenant or co-adturer.

V.

Answering paragraph VIII defendant admits the execution and delivery on or about the several dates averred in said paragraph of the transfers and assignments mentioned therein and also the contents and correctness of Exhibits "G" to "U" inclusive, which are attached to the Complaint; but defendant expressly and specifically denies each and every averment in said paragraph which avers that any of or all the documents mentioned therein and copies of which are attached to the Complaint as Exhibits "G" through "U" inclusive, created or gave rise to any relationship of co-adventure or co-tenancy between Frank Kennedy, his estate, or any of the plaintiffs herein, and Shell Oil Company, In-

corporated, Standard Oil Company of California, and the defendant, or any of defendant's predecessors in interest; and defendant also expressly denies that any relationship of co-adventure or co-tenancy exists or ever did exist between Frank Kennedy, his estate, or any of the plaintiffs, and the defendant or any of defendant's predecessors in interest, by reason of any of the aforesaid documents or otherwise or at all, and further denies that any of the transfers or assignments mentioned in said paragraph were made to or from the persons or corporations mentioned in said paragraph as co-adventurers or co-tenants, and denies that any of said assignments and transfers were made pursuant to any agreement of co-tenancy or co-adventure between any of the persons or corporations mentioned in said paragraph.

VI.

Answering paragraph IX defendant admits the execution and delivery on or about the several dates averred in said paragraph of the leases mentioned in subdivisions (a), (b), (c), and (d) and also the contents and correctness of Exhibits "V" and "W" which are attached to the Complaint; but defendant expressly and specifically denies each and every averment in said paragraph which avers that any of or all the leases or documents mentioned therein and copies of which are attached to the Complaint as Exhibits "V" and "W" created or gave rise to any relationship of co-adventure or co-tenancy between Frank Kennedy, his estate, or any of the plaintiffs, and Kettleman Oil Corporation, Pacific

Western Oil Company or the defendant, or any of defendant's predecessors in interest; defendant also expressly denies that Frank Kennedy had reserved a part of the lands mentioned in said paragraph as co-adventurer or co-tenant and denies that he, his estate, or any of the plaintiffs herein now are or ever were co-adventurers or co-tenants therein with defendant or any of defendant's predecessors in interest, or any of the persons or corporations mentioned in said paragraph.

VII.

Answering paragraph XI defendant admits the execution and delivery on or about the several dates averred in said paragraph of the unit plan agreement and consents and agreements mentioned therein, and also admits the contents and correctness of Exhibits "Y", "Z" and "AA" which are attached to the Complaint. Defendant denies that defendant or its predecessors in interest, or any of them, agreed to pay or to discharge any obligation to Frank Kennedy as co-tenant or co-adventurer and, in this connection, denies that said Frank Kennedy ever was or that his estate or any of the plaintiffs now is or are co-tenants or co-adventurers in any of the lands referred to in said paragraph with defendant, its predecessors in interest, or any of them. Defendant further denies that the said Frank Kennedy at any time ever was, and denies that his estate now is, a co-adventurer or co-tenant with Kettleman Oil Corporation and Pacific Western Oil Company, its successors in interest or any of them,

or the defendant herein, in the whole or any portion of the lands referred to in said paragraph XI, or the oil, gas, or other hydrocarbon substances or any portion thereof at any time produced from the whole or any portion of said lands, and denies that the said Frank Kennedy at any time ever was and denies that his estate now is entitled to receive as co-tenants or co-adventurers any of the oil, gas or other hydrocarbon substances, or royalties in lieu thereof or therefrom, from the whole or any portion of said lands as co-tenants or co-adventurers, and denies that any of the acts and things alleged in said paragraph XI to have taken place were done by the said Frank Kennedy or his estate, Kettleman Oil Corporation or Pacific Western Oil Company, its successors in interest or any of them, or the defendant herein, as co-adventurers and co-tenants in the whole or any portion of the lands referred to in said paragraph XI, or as co-adventurers and co-tenants, or as co-adventurers or co-tenants in the oil, gas, or other hydrocarbon substances or the royalties in lieu thereof or therefrom from the whole or any portion of said lands.

VIII.

Answering paragraph XII defendant denies that Kettleman Oil Corporation or Pacific Western Oil Company or their successors in interest, or defendant herein or any of them, now are or ever were co-adventurers or co-tenants with Frank Kennedy, his estate, or plaintiffs herein or any of them, in the lands or any portion thereof referred to in said paragraph XII or in any oil, gas or other hydro-

carbon substances in or produced from the whole or any portion of said lands, and further denies that the said Frank Kennedy, his estate or plaintiffs or any of them, now are or ever were the owners as co-adventurers or co-tenants with Kettleman Oil Corporation or Pacific Western Oil Company or their successors in interest, or defendant herein, of any of the royalties referred to in said paragraph XII. Defendant denies that any of the lands or any portion thereof referred to in said paragraph XII now are or ever were "co-tenancy" lands and further denies that the unit plan agreement referred to in said paragraph XII or any unit plan agreement or any agreement whatsoever resulted in the inclusion therein or the inclusion in the lands of the Kettleman North Dome Association of any co-tenancy leased lands of said Frank Kennedy or his estate or plaintiffs herein or any of them.

IX.

Answering paragraph XIII defendant denies that continuously since the formation of Kettleman North Dome Association mentioned in paragraph XIII of plaintiffs' Complaint or since the execution of the unit plan agreement mentioned in said paragraph or at any other time or at all said Kettleman North Dome Association allocated to Kettleman Oil Corporation or to Pacific Western Oil Company a portion or any or all the oil and gas produced from the lands referred to in said paragraph XIII by reason of the right of Kettleman Oil Corporation, Pacific Western Oil Company, Frank Kennedy, his estate, or any of the plaintiffs herein

as co-tenants to produce oil and gas from said lands and denies that said Kettleman North Dome Association now allocates to defendant or ever has allocated to defendant as one of the successors in interest of Kettleman Oil Corporation and Pacific Western Oil Company or at all a portion or any of the oil and gas produced from the lands referred to in said paragraph XIII by reason of the right of defendant as one of the successors in interest of Kettleman Oil Corporation and Pacific Western Oil Company or in any other capacity and Frank Kennedy or his estate or any of the plaintiffs herein as co-tenants and co-adventurers to produce oil and gas from said lands; defendant denies that Frank Kennedy or his estate or any of the plaintiffs herein is or are now or ever was or were a co-tenant or co-adventurer with Kettleman Oil Corporation, Pacific Western Oil Company or the defendant.

X.

Defendant admits the averments in paragraph XIV except that in so far as the extraction of casinghead gasoline by Kettleman Oil Corporation, Pacific Western Oil Company, and their successors in interest, and defendant is alleged to have been made "from the gas allocated to them as alleged in the next preceding paragraph" defendant denies that any gas allocated to said Kettleman Oil Corporation, Pacific Western Oil Company, and their successors in interest, and defendant herein was allocated to said persons or corporations as co-adventurers or co-tenants in the lands or any portion thereof referred to in said paragraph XIV.

XI.

Answering paragraph XV defendant avers that the payments made to said Frank Kennedy and to his estate and to plaintiffs and each of them, and referred to in said paragraph XV, were in fact the true value of the said Frank Kennedy's share, his estate's share and the plaintiffs' share of all oil and gas referred to in said paragraph; denies that the correctness or incorrectness of said payments could ever or now can be ascertained only from facts known to defendant and its predecessors in interest, or either or any of them. Defendant denies that Frank Kennedy at any time reposed or had any trust or confidence in defendant or defendant's predecessors in interest or any of them as his co-adventurers or co-tenants or otherwise or at all; defendant denies that the said Frank Kennedy at any time reposed and had any trust or confidence in the representations of defendant or defendant's predecessors in interest or any of them as his co-adventurers or co-tenants or otherwise or at all, and further denies that said Frank Kennedy relied upon the representations of any of the persons or corporations mentioned in said paragraph XV that the payments referred to in said paragraph XV were correct. Defendant denies that any co-tenancy or co-adventure at any time existed between the said Frank Kennedy, his estate, any of the plaintiffs herein and defendant herein or any of defendant's predecessors in interest.

XII.

Answering paragraph XVI defendant denies that the first intimation to said Frank Kennedy that the defendant or its predecessors in interest or any of them did not and had not fully, truly and correctly accounted to Frank Kennedy for the true value of his share of the oil produced and saved from the lands referred to in said paragraph was subsequent to the filing of the action referred to in said paragraph XVI; in this connection defendant avers that the defendant and its predecessors in interest and each of them, had at all times fully, truly and correctly accounted to said Frank Kennedy, his estate, and each of plaintiffs herein, for the true value of his and their reserved and royalty shares of the oil produced and saved from the lands referred to in said paragraph XVI. Defendant denies that the said Frank Kennedy, his estate, or any of plaintiffs herein, now are or ever were co-adventurers or co-tenants with defendant herein, its predecessors in interest, or any of them, in the lands or leases referred to in said paragraph XVI or in the oil, gas and hydrocarbon substances produced therefrom, and denies that any co-tenancy or co-adventure at all existed between the said persons and corporations at any time.

XIII.

Answering paragraph XVII defendant admits the averments thereof except in so far as said paragraph avers that the interest of said Frank Kennedy in the lands referred to in said paragraph was as set out in paragraph V of plaintiffs' Com-

plaint. Defendant denies that any arrangement or relationship of co-tenancy or co-adventure at any time existed between said Frank Kennedy and Kettleman Oil Corporation, or its successors in interest, or defendant herein, and denies that the said Frank Kennedy, his estate, or any of plaintiffs herein now have or ever had any interest in said lands as co-adventurers or co-tenants with Kettleman Oil Corporation, its successors in interest, or defendant herein.

XIV.

Answering paragraph XVIII defendant denies that it became or ever was or now is by the transfers described in paragraphs VI, VII and VIII of plaintiffs' Complaint or otherwise or at all, co-tenant or co-adventurer with Frank Kennedy, his estate, or any of plaintiffs herein, in any of the lands or interests referred to in said paragraph XVIII or at all. Defendant denies that any original arrangement of co-adventure referred to in said paragraph XVIII or any arrangement of co-adventure or co-tenancy exists or ever did exist between Frank Kennedy, his estate, or any of the plaintiffs herein and Kettleman Oil Corporation, its successors in interest, or defendant. Defendant denies that by having become a member of Kettleman North Dome Association it has or ever had by virtue of Article XI of Kettleman North Dome Association Unit Plan Agreement or any agreement or at all, assumed all or any of the obligations of its pre- or at all as co-adventurer or co-tenant with said decessors in interest under said unit plan agreement

Frank Kennedy, his estate, or any of plaintiffs herein. Defendant admits the contents and correctness of Exhibit "CC" which is attached to the Complaint.

XV.

Defendant denies that it now holds or ever held its position or ownership in Kettleman North Dome Association or in the oil, gas and other hydrocarbon substances produced and allocated from the lands in the North Dome Kettleman Hills Field by the agreements of co-adventure and co-tenancy referred to in said paragraph XIX or any agreement of co-adventure or co-tenancy whatsoever; denies that the agreements of co-adventure and co-tenancy referred to in said paragraph XIX now are or ever were in force and effect, and denies that any of or all said agreements created any relationship of co-adventure or co-tenancy and denies that any such relationship ever was or now is in force and effect. Defendant admits that it does not now deny and never has denied the right of Frank Kennedy, his estate, and all plaintiffs herein, to royalties upon oil, gas and other hydrocarbon substances produced and allocated under the agreements referred to in said paragraph.

XVI.

And further answering the averments in the Complaint and in each count thereof, defendant denies that there is or ever was any agreement of any kind or character whatsoever or at all between Frank Kennedy or any of the plaintiffs and defendant or any of its predecessors in interest that said

Frank Kennedy or any of the plaintiffs should be or were co-adventurers or co-tenants with defendant or any of its predecessors in interest in any of the lands mentioned in the Complaint or in any of the oil, gas or other hydrocarbons therein or produced therefrom, denies that Frank Kennedy or any of the plaintiffs is or ever was co-adventurer or co-tenant with defendant or any of its predecessors in interest in any of said lands or in any oil, gas or other hydrocarbons therein or produced therefrom; and denies that there is or ever was any confidential relationship between said Frank Kennedy or any of the plaintiffs and defendant or any of its predecessors with respect or in relation to any of the matters or things averred in any of said counts.

Answering the Second Cause of Action of plaintiffs' Complaint herein, defendant admits, denies and avers as follows:

I.

Defendant admits and denies the averments of paragraph I in the same manner and to the same extent as heretofore admitted and denied in its answer to plaintiffs' First Cause of Action herein.

II.

Defendant denies the averments and each of them contained in paragraphs II and III.

Answering the Third Cause of Action of plaintiffs' Complaint herein, defendant admits, denies and avers as follows:

I.

Defendant admits and denies the averments of paragraph I in the same manner and to the same extent as heretofore admitted and denied in its answer to plaintiffs' First Cause of Action herein.

II.

Defendant denies the averments and each of them of paragraphs II and III and, in this connection, avers that the payments referred to in said paragraph II were in fact full, true and correct payments to the said Frank Kennedy of the full amount of his royalty computed upon the true value of all oil, gas or other hydrocarbon substances referred to in said paragraph II.

For a First Affirmative Defense to said Complaint, defendant avers:

I.

That the causes of action, and each of them, set forth in said Complaint are and each is barred by the provisions of Subdivision 1 of Section 337 of the Code of Civil Procedure of the State of California.

For a Second Affirmative Defense to said Complaint, defendant avers:

I.

That the causes of action, and each of them, set forth in said Complaint are and each is barred by the provisions of Section 343 of the Code of Civil Procedure of the State of California.

For a Third Affirmative Defense to said Complaint, defendant avers:

I.

Pursuant to the various agreements whereunder and whereby the said Frank Kennedy became entitled to receive from defendant herein royalties on account of oil, gas or other hydrocarbon substances from the lands referred to in plaintiffs' Complaint, defendant prepared each month a monthly statement of the royalties due said Frank Kennedy for the month covered by said statement, and each month delivered such statement to said Frank Kennedy accompanied by its check in the amount of such royalties shown to be due for such month.

II.

Said monthly statements of oil royalties from defendant to said Frank Kennedy, and said monthly royalty checks accompanying said statements, payable to the said Frank Kennedy in the amount of the royalties shown to be due by said statements, were tendered by defendant to said Frank Kennedy for each month from and including May 31, 1931 to the time of the commencement of this action upon the express condition that said monthly statements and said accompany checks were to be accepted by the said Frank Kennedy in full and complete satisfaction of all the rights of the said Frank Kennedy and all obligations due the said Kennedy from defendant for the period covered by each such statement and check. Said Frank Kennedy retained, cashed and realized the amount of each such

monthly check so delivered by defendant to said Frank Kennedy from and including the month of May 1931 to and including the time of the commencement of this action. Said Frank Kennedy received and assented to each said monthly statement, and received and cashed and realized the proceeds of each said monthly check with full knowledge and understanding that the same were tendered by defendant to him as a full and complete satisfaction of all defendant's obligations to the said Frank Kennedy for the period covered by each such statement and check.

III.

By reason of the foregoing, a full and complete accord was reached between said Frank Kennedy and defendant each month for the above-mentioned period of time, and a full and complete satisfaction of defendant's obligations to said Frank Kennedy and of said Kennedy's rights in the matter, existed and now exists between the defendant and plaintiffs herein.

Wherefore, defendant prays that plaintiffs take nothing by their Complaint herein, or any cause of action thereof; that defendant be dismissed hence; that it recover its costs herein expended; and for such other and further relief as to the Court may seem meet and proper.

Dated: February 21st, 1955.

/s/ HERBERT W. CLARK,
Attorney for Defendant

Of Counsel:

/s/ Morrison, Foerster, Holloway, Shuman & Clark

/s/ Alfred L. Gibson

Acknowledgment of Service attached.

[Endorsed]: Filed February 21, 1955.

[Title of District Court and Cause.]

STATEMENT OF AGREED FACTS

It is hereby Stipulated and Agreed by and between the parties hereto by their respective counsel as follows:

I.

Frank Kennedy died on October 4, 1946 and thereafter such proceedings were duly taken and had in the Superior Court of the State of California in and for the County of San Mateo that by an order of said court duly given and made on November 4, 1946, plaintiffs Katharine H. Kennedy and Mark C. Elworthy were duly appointed executors of the last will and testament of said Frank Kennedy, deceased, and they thereupon and on November 7, 1946 duly qualified as such executors and ever since have been and now are the duly appointed, qualified and acting executors of the will of said Frank Kennedy, deceased. Said Katharine H. Kennedy and Mark C. Elworthy as such executors of the will of Frank Kennedy, deceased, now

are and were at the time of the commencement of this action duly authorized and empowered to commence and prosecute this action on behalf of the estate of said Frank Kennedy, deceased.

II.

At all times mentioned in the complaint on file herein the defendant Honolulu Oil Corporation has been and now is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware.

III.

Frank Kennedy was, during his lifetime, and plaintiffs Katharine H. Kennedy and Mark C. Elworthy, and each of them, are, and at all times mentioned in the complaint on file herein, were citizens of the State of California; defendant Honolulu Oil Corporation is a citizen of the State of Delaware; and the amount in controversy in this action exceeds Three Thousand Dollars ($3,000) exclusive of interest and costs.

IV.

On January 6, 1927, Frank Kennedy was the owner and in possession of:

(a) all that certain lot, piece, or parcel of land situate in the County of Fresno, State of California, bounded and described as follows, to wit:

The South West Quarter (SW¼) of Section Twenty-two (22), Township Twenty-one (21) South, Range Seventeen (17), East, M.D.B. & M.

(b) U. S. Oil and Gas Prospecting Permit bear-

ing Serial No. Visalia 09551, issued to Thomas M. Crum by the U. S. General Land Office, Department of the Interior, under date of May 28, 1921, and subsequently transferred, by mesne assignments, to Frank Kennedy; which said U. S. Oil and Gas Prospecting Permit was subsequently renumbered "Sacramento 019438", and covered the following described land located in the County of Fresno, State of California, to-wit:

The South half (S½) and the Northwest quarter (NW¼) of Section 18; all of Sections 20, 28, and 30; and the Northeast quarter (NE¼) of Section 32, Township 21 South, Range 17 East, M.D.B. & M., containing 2556.58 acres, more or less.

The said U. S. Oil and Gas Prospecting Permit, Serial No. Visalia 09551, subsequently ripened into oil and gas leases which were and are numbered Sacramento 019438(c) and Sacramento 019438(d), and also into other oil and gas leases which, however, are not involved in this litigation.

V.

Entitled in this action and accompanying and to be filed with this Statement of Agreed Facts is a file of exhibits which is marked "Photostatic Copies of Exhibits 'A' to and including 'GG' ". The said file so entitled and marked contains photostatic copies of all exhibits attached to the complaint in this action and, in addition, Exhibits "DD", "EE", "FF" and "GG". The said Exhibits "A" to and including "G" contained in said file so entitled and marked, are all the written, typed, or printed docu-

ments, letters and materials (except this Statement of Agreed Facts, matters admitted by the pleadings herein, statutes, regulations, adjudicated cases and matters of which this Court will take judicial notice) which have pertinency, relationship of any kind or materiality whatsoever to and in respect of any question arising in this litigation. The said exhibits in said file so entitled and marked are believed to be true, correct and complete copies of the originals of said Exhibits "A" through "GG" and they, or such substitutes therefor as counsel may agree upon in writing, shall be considered by Court and counsel in this action as and in lieu of the originals.

VI.

The original of each and every one of the instruments, photostatic copies of which are contained in said file marked "Photostatic Copies of Exhibits 'A' to and including "CC" was, on or about the date that each of said exhibits bears, executed by the person or persons, corporation or corporations, and delivered to the person or persons, corporation or corporations which, on the face of each of said photostatic copies, it purports to have been executed by and delivered to.

VII.

The royalties paid and payable to Frank Kennedy and plaintiffs herein by defendant Honolulu Oil Corporation, or its predecessors in interest, upon production allocated to defendant Honolulu Oil Cor-

poration, or its predecessors in interest, pursuant to the provisions of Exhibit "Y", were paid and are payable by reason of the terms of said Exhibits "A" through "CC" or some of them, as such exhibits severally relate to either all or only a therein specified part of the lands and interests in lands hereinafter described, and by reason of the transfer to Kettleman North Dome Association of the operating rights in, to, on and in respect of the following described lands and interests in lands, referred to in said Exhibits "A" through "CC", or some of them, to-wit:

The South Half (S½) of the Southwest Quarter (SW¼) of Section Twenty-two, the North Half (N½) of Section 28, the Northeast Quarter (NE¼) of Section 20, lots 1 and 2; and the East Half (E½) of the Northwest Quarter (NW¼) and the Northeast Quarter (NE¼) of Section 30, and the North Half (N½) of the Northeast quarter (NE¼) of Section 32, all in Township 21 South, Range 17 East, M.D.B. & M.; the North Half (N½) of the Northwest Quarter (NW¼) of Section 1, the South Half (S½) of the Northeast Quarter (NE¼) of Section 12, the North Half (N½) of the Northeast Quarter (NE¼) of Section 18, the Northeast Quarter (NE¼) of Section 8, and the North Half (N½) of the Northwest Quarter (NW¼) of Section 14, all in Township 22 South, Range 17 East, M.D.B. & M.; the Northwest Quarter (NW¼), and the West Half (W½) of the Northeast Quarter (NE¼), and the West Half (W½) of the Southwest Quarter (SW¼) of Sec-

tion 34, Township 21 South, Range 17 East, M.D. B. & M.

The said South Half of the Southwest Quarter of Section 22, Township 21 South, Range 17 East, M.D.B. & M. is a portion of the land described in paragraph IV(a) of this Statement of Agreed Facts. The North Half of Section 28, Township 21 South, Range 17 East, M.D.B. & M. is a part of the lands described in United States Oil and Gas Prospecting Permit Serial No. Visalia 09551, which permit ripened into Oil and Gas Lease numbered "Sacramento 019438(c)", and the Northeast Quarter of Section 20, lots, 1, 2, and the East Half of the Northwest Quarter and the Northeast Quarter of Section 30, and the North Half of the Northeast Quarter of Section 32, Township 21 South, Range 17 East, M.D.B. & M., are lands covered by said United States Oil and Gas Prospecting Permit Serial No. Visalia 09551 which ripened into Oil and Gas Lease numbered "Sacramento 019438(d)". The North Half of the Northwest Quarter of Section 1, the South Half of the Northeast Quarter of Section 12, the North Half of the Northeast Quarter of Section 18, the Northeast Quarter (NE¼) of Section 8, and the North Half of the Northwest Quarter of Section 14, all in Township 22 South, Range 17 East, M.D.B. & M. and the Northwest Quarter (NW¼), and the West Half (W½) of the Northeast Quarter (NE¼), and the West Half (W½) of the Southwest Quarter (SW¼) of Section 34, Township 21 South, Range 17 East, M.D.B. & M. are other lands not included in said Government leases in which de-

fendant Honolulu Oil Corporation and its predecessors in interest and said Frank Kennedy and plaintiffs herein acquired their respective interests, rights and obligations pursuant to the provisions of the said Exhibits "A" through "CC" or some of them.

VIII.

Defendant Honolulu Oil Corporation, pursuant to the terms and provisions of Exhibit "C" assumed its pro rata share of all of the liabilities and obligations of its predecessors in interest, Kettleman Oil Corporation, Ltd., Pacific Western Oil Company, and Kettleman and Inglewood Corporation, in respect to the lands and leases hereinabove described, which said liabilities and obligations were created through or by reason of the terms of said Exhibits "A" through "CC" or some of them, and such exhibits severally relate to the lands and interests in lands hereinabove described.

IX.

During the period of time involved in this action defendant Honolulu Oil Corporation has been engaged in the business of acquiring lands and interests in lands; exploring, drilling, and developing them for oil, gas and other hydrocarbon substances; and selling to others the oil, gas, and other hydrocarbon substances produced therefrom, and/or distributed to it from other lands or interests in lands acquired by it, or in which it has an interest; but said defendant has never been engaged in the business of refining crude oil or selling the refined products therefrom. All of defendant Honolulu Oil Corporation's share of the oil production allocated and

allotted to it pursuant to the provisions of said Exhibit "Y" as aforesaid was sold by defendant or its predecessors in interest in its crude state to other oil companies who purchased it. The prices accepted by defendant Honolulu Oil Corporation or its predecessors in interest for, and for which it or they sold such oil, were the prices offered and paid by the oil companies purchasing it at the place of production, and defendant or its predecessors in interest accepted the highest prices so offered and paid for such oil, and defendant or its predecessors in interest as the seller of such oil or otherwise, did not participate in any way whatsoever in deciding or determining what price or prices would be paid by such purchasing companies for the oil purchased by them and sold to them, or any of them, by defendant Honolulu Oil Corporation or its predecessors in interest.

X.

Defendant Honolulu Oil Corporation and its predecessors in interest have in turn accounted to Frank Kennedy and the plaintiffs and paid to them a royalty based and computed upon the price received by defendant Honolulu Oil Corporation or its predecessors in interest from the sale of the oil allocated to said defendant or its predecessors in interest on account of the land described in this Statement of Agreed Facts. The mathematical computation of such royalty payments made by defendant Honolulu Oil Corporation and its predecessors in interest, based upon such prices received by defendant or its predecessors in interest is correct; defend-

ant Honolulu Oil Corporation has represented to Frank Kennedy and plaintiffs and now contends that such payments are the full payments to which Frank Kennedy was and plaintiffs are entitled; whereas, plaintiffs contend that during the period commencing July 1, 1931 and ending August 29, 1935, such payments, based upon such prices so received by defendant Honolulu Oil Corporation and its predecessors in interest, were not the full or proper royalties payable to Frank Kennedy and the plaintiffs.

During the period of time involved in this litigation, that is from July 1, 1931 to August 29, 1935, defendant Honolulu Oil Corporation prepared or caused to be prepared on its behalf, and defendant's predecessors in interest prepared or caused to be prepared on their behalf, and submitted to said Frank Kennedy and the plaintiffs herein, monthly statements of the royalties due said Frank Kennedy for the month covered by each such statement, and each month delivered such statement to said Frank Kennedy, accompanied by a check in the amount of such royalties shown to be due for such month; and said checks were retained and cashed by said Frank Kennedy and plaintiffs herein. Such statements were in the nature and form of Exhibit "EE" to this Statement of Agreed Facts.

XI.

Plaintiffs' action and claimed right to recovery herein are directed to, and involved only:

(a) the production of crude oil; and

(b) payments of royalty thereupon during the period of time beginning July 1, 1931 to and including August 29, 1935.

XII.

All of the crude oil involved in this litigation was produced from lands, the operating rights to and with respect to which were transferred and set over to Kettleman North Dome Association in accordance with the terms of the exhibits attached to this Statement of Agreed Facts, and which lands were at all times involved herein within the red line depicted on the map or plat which is attached to Exhibit "Y", as said red line existed from time to time during said period commencing July 1, 1931 and ending August 29, 1935. No part of the North Half of the Southwest Quarter of Section 22, Township 21 South, Range 17 East, M.D.B. & M., being a portion of the lands described in paragraph IV(a) of plaintiffs' complaint, has ever been situated within the blue line so depicted in Exhibit "Y", but at all times involved in this litigation has been situated in what is referred to in said Exhibit "Y" as "non-participating areas", and no production therefrom or allocable thereto, is involved in this litigation.

The South Half of the Southwest Quarter of Section 22, Township 21 South, Range 17 East, M.D.B. & M. was from April 1931 to April 30, 1936 included within the participating areas under the Unit Agreement for the North Dome of Kettleman Hills, which is Exhibit "Y". On April 30, 1936 the South Half of the Southwest Quarter of Section 22,

Township 21 South, Range 17 East, M.D.B. & M. was excluded from participation under said Unit Agreement. As appears from Exhibits "FF" and "GG" neither Frank Kennedy, nor his assigns or successors in interest, nor the plaintiffs herein, ever consented to the defendant herein or its predecessors in interest, joining said Unit Agreement with respect to said above described land and refused to consent to the inclusion of said property or his or their interest in said property within the terms of said Unit Agreement. From and after April 30, 1936 no production was allocated to said described land under said Unit Agreement, and the production and proceeds of said production allocated to said South Half of the Southwest Quarter of Section 22, Township 21 South, Range 17 East, M.D.B. & M. from April 1931 to April 30, 1936 never became payable to said Frank Kennedy, or his assigns, or plaintiffs herein, by reason of his and their refusal to consent to the inclusion in said Unit Agreement of said property, and no production from said land nor any proceeds of said production is or are involved in this litigation.

XIII.

Exhibit "DD" to this Statement of Agreed Facts is a statement covering the period beginning July 1, 1931 to August 29, 1935, which shows in summary form the amounts of the payments which Frank Kennedy claimed and plaintiffs herein claim should have been paid on account of such production of crude oil from or allocated to the lands herein-

above described during such period, which amounts and claims are based upon the price which Frank Kennedy asserted and plaintiffs assert was the fair and true market value of such crude oil during such period; the difference in the amount so paid to Frank Kennedy by defendant Honolulu Oil Corporation and its predecessors in interest and the amount so claimed by Frank Kennedy and the plaintiffs being the sum of $9,519.11.

XIV.

If the Court shall, upon the evidence agreed to by the parties in this Statement of Agreed Facts and the matters admitted by the pleadings, find that the claim of plaintiffs is barred by any applicable statute of limitations, then plaintiffs' claim for said sum of $9,519.11 shall be denied and defendant shall have judgment herein.

XV.

Conversely, if the Court shall, upon the evidence agreed to by the parties in this Statement of Agreed Facts and the matters admitted by the pleadings, find that plaintiffs' claim is not barred by any applicable statute of limitations, then plaintiffs' claim for said sum of $9,519.11 shall be allowed, and plaintiffs shall have judgment against defendant in satisfaction of the accounting prayed for in plaintiffs' complaint, for said principal sum of $9,519.11. In the event that plaintiffs shall also have judgment against defendant as provided in the preceding paragraph of this Statement of Agreed Facts, it is understood and agreed that this statement does not

cover the allowance or disallowance of interest thereon, and that:

(a) plaintiffs shall be free to urge the allowance of interest upon the principal amount of said judgment, or any part thereof, at such rate and in such manner as they shall deem proper; and

(b) defendant shall be free to resist the allowance of interest in whole or in part, as it may deem proper.

XVI.

This Statement of Agreed Facts, together with the exhibits contained in said file marked "Photostatic Copies of Exhibits 'A' to and including 'GG'," and the matters admitted by the pleadings, constitute all the material evidence in, and as well the only evidence that will be offered or used by any of the parties to this action, at any trial on the merits of this cause. Nothing herein contained shall be construed as a waiver by any of the parties hereto of their rights to review on appeal any question of law or of fact arising in this action.

Dated: August 17, 1955.

/s/ PEDDER, FERGUSON & PEDDER,
Attorneys for Plaintiffs

/s/ HERBERT W. CLARK,
Attorney for Defendant

Of Counsel for Defendant:

/s/ Morrison, Foerster, Holloway, Shuman & Clark,

/s/ Alfred L. Gibson

[Endorsed]: Filed August 17, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

To the Plaintiffs Above Named and to Messrs. Pedder, Ferguson & Pedder, their Attorneys:

Take Notice that on November 28, 1955, at the hour of 9:30 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, in the Law and Motion Department of the above-styled court, the Honorable George B. Harris presiding, the above named defendant, by its undersigned counsel, will move the said court to enter summary judgment for the defendant in the above entitled action in accordance with the provisions of Rules 56(b) and (c) of the Federal Rules of Civil Procedure on the ground that the pleadings, the Statement of Agreed Facts on file in said action, and the exhibits contained in the file of exhibits which is marked "Photostatic Copies of Exhibits A to and including GG", which is referred to in paragraph V of said Statement of Agreed Facts, show that the said defendant is entitled to judgment as a matter of law.

Dated: October 11th, 1955.

/s/ HERBERT W. CLARK,
Attorney for Defendant

Of Counsel for Defendant:

/s/ Morrison, Foerster, Holloway, Shuman & Clark

/s/ Alfred L. Gibson

SUMMARY JUDGMENT

This cause having come on for hearing before this Court on November 28, 1955, on defendant's motion for a summary judgment, the said hearing having been specially set for said date, and the said motion having been argued by Herbert W. Clark, Esq., appearing for defendant Honolulu Oil Corporation, and by Kenneth Ferguson, Esq., appearing on behalf of plaintiffs Katharine H. Kennedy and Mark C. Elworthy;

And it appearing from the pleadings, exhibits, papers and records on file herein, the affidavit of Herbert W. Clark, Esq., filed in support of said motion, and from the Statement of Agreed Facts on file herein, that no controverted issue of fact remains to be tried by this Court as to whether so much of plaintiffs' complaint and each cause of action thereof as pertains or related to the period prior to November 21, 1946, is barred by the applicable statutes of limitations of the State of California;

And it appearing to the Court as a matter of law that so much of said cause of action and each count thereof as pertains or relates to the period of time prior to November 21, 1946, is and are barred by the applicable statutes of limitations of the State of California;

It is hereby Ordered, Adjudged and Decreed that defendant Honolulu Oil Corporation have judgment against plaintiffs and each of them as to all claims asserted by said plaintiffs against said defendant

pertaining or relating to any period of time prior to November 21, 1946, and that plaintiffs and each of them take nothing by so much of said complaint and each cause of action thereof as relates or pertains to any period of time prior to November 21, 1946.

Dated: October ....., 1955.

.....,
Judge of the United States District Court

[Endorsed]: Filed October 12, 1955.

[Title of District Court and Cause.]

AFFIDAVIT

State of California,
City and County of San Francisco—ss.

Herbert W. Clark, being first sworn, deposes and says:

He is and at all times herein mentioned has been a member of the State Bar of California. He was attorney for Honolulu Oil Corporation in that certain action in the District Court of the Southern District of California, Central Division, No. 467-B-Civil, entitled United States vs. General Petroleum Corporation of California, et al., the opinion and decision in which is reported in 73 F. Supp. 225-264. Honolulu Oil Corporation, which is the defendant in the instant action and for which this affiant is an

attorney in the instant action, was also one of the defendants in said action No. 467-B in the District Court for said Southern District of California, Central Division. Said civil action is the action referred to in paragraph XVI, page 18, of the complaint herein. For brevity the said civil action No. 467-B will be herein referred to as the Los Angeles Federal Court Action.

The lands and leases involved in the instant action were involved, with other lands and leases, in said Los Angeles Federal Court Action, and so also was the question of the fair market value thereof, that is to say the fair market value of the production of crude oil and casinghead, natural and dry gas therefrom for certain years prior to July 1, 1939, which was the date on which the complaint therein was filed. The market for the production from a part of the lands involved in the instant action was the market at Kettleman Hills.

The court in said Los Angeles Federal Court Action found, inter alia, that,

"At no time during the period in suit prior to August 29, 1935, was there an open or a competitive market for crude oil at Kettleman Hills and at all such times the posted field prices at Kettleman Hills were artificial and discriminatory, were substantially less than the prices the integrated defendants were paying for comparable crude oil in other California fields, and were substantially less than the reasonable market value of such oil. During the remainder of the period in suit the posted

prices at Kettleman Hills were in line with the prices posted for comparable oil in other important California fields and properly measured the reasonable market value of such oil. There was no evidence that the nonintegrated defendants had anything to do with the determination of the posted prices."

On February 25, 1947 the United States District Judge in the Los Angeles Federal Court Action rendered and caused to be entered judgment in favor of United States of America, the plaintiff therein, and against the defendants therein, including the defendant Honolulu Oil Corporation. A photostatic copy of a certified copy of said judgment as entered and docketed is hereto attached, marked Exhibit A, and made a part of this affidavit.

/s/ HERBERT W. CLARK

Subscribed and sworn to before me this 11th day of October, 1955.

[Seal] /s/ ALICE C. MORSE,
Notary Public in and for the City and County of San Francisco, State of California.

EXHIBIT A

In the District Court of the United States, Southern District of California, Central Division

No. 467-B Civil

United States of America, Plaintiff, vs. General Petroleum Corporation of California, et al., Defendants.

JUDGMENT

Declaring certain of the rights and liabilities of the parties hereto under certain oil and gas leases covering government lands in the Kettleman Hills North Dome field in Kings and Fresno Counties, California, and adjudging the amounts in which certain of the defendants are liable to plaintiff on account of royalties on crude oil, natural gas, and natural-gas gasoline produced under said leases during the period July 1, 1931 to and including June 30, 1939.

This cause having heretofore come on regularly for trial before the above entitled court and evidence having been adduced and the cause argued and the Court being advised in the premises and having made and entered herein its Findings of Fact and Conclusions of Law, now, therefore, it is hereby Ordered, Adjudged and Declared as follows:

I.

It is Ordered and Adjudged that as between plaintiff, The United States of America, and defendants, The Texas Company and Kettleman

North Dome Association, this action be and the same is hereby dismissed.

II.

As between plaintiff, the United States of America, and defendants, General Petroleum Corporation of California; Standard Oil Company of California; Shell Oil Company, Incorporated; Tide Water Associated Oil Company; Union Oil Company of California; Continental Oil Company; Seaboard Oil Company of Delaware; Honolulu Oil Corporation; Standard Oil Company of Texas; Pacific Western Oil Corporation; Pioneer Kettleman Company; George F. Getty, Inc.; Belmont Investment Company and Cynthia Beal, Neil S. McCarthy and A. Calder Mackay, as trustees of said Belmont Investment Company, a corporation in process of dissolution; Ervin S. Armstrong; Etta Helm, as Executrix of the Estate of Lesrey G. Helm, deceased, and Silas L. Gillan; and Carrie Estelle Doheny, Lucy Smith Battson and Los Nietos Company, and each of them, it is Adjudged and Declared that the Secretary of the Interior of the United States is not and never has been empowered by the terms of the leases involved herein, or otherwise, to make a binding determination of or to fix for royalty purposes the value of the crude oil produced under said leases from plaintiff's lands in the Kettleman Hills North Dome field and that none of said defendants have been or are obligated to pay their crude oil royalty obligations to the United States on the minimum price basis prescribed by the said Secretary's order of June 4, 1931. The leases above referred to are

known and designated by their Sacramento serial numbers as leases 019419 (a) and (b); 019492 (a), (b), (c), (d), (e) and (f); 019327 (a), (b), (c), (d) and (e); 019438 (a), (b), (c) and (d); 019696 (a), (b), (c), (d), (e), and (f); 019445 (a), (b), (c) and (d); and 019772 (a).

III.

As between plaintiff and the defendants named in paragraph II supra, it is Adjudged and Declared that when plaintiff is taking its royalties in money the Secretary of the Interior of the United States is lawfully empowered by the terms of the aforesaid leases to determine and fix the value for royalty purposes of the natural gas and natural-gas gasoline produced thereunder and that the said Secretary's minimum price orders of June 4, 1931 and June 23, 1931, insofar as they relate to gas and casing-head gasoline, were at all times from the respective dates of said orders to the filing of this suit (July 10, 1939) valid orders binding on the said defendants and each of them and that said Secretary's so-called natural gas net realization order of June 7, 1937, insofar as it applies to natural gas produced under said leases during the period June 1, 1937 to the filing of this suit, has at all such times been a valid order binding on said defendants and each of them, but that said natural gas net realization order, insofar as it purports to apply to gas produced under said leases prior to June 1, 1937, is invalid and is not and never has been binding on said defendants or any of them.

IV.

It is Ordered and Adjudged that plaintiff have and recover on account of royalties on crude oil, natural gas and natural-gas gasoline produced under defendants' leases during the period July 1, 1931 to and including June 30, 1939, as follows:

(1) From defendant General Petroleum Corporation of California the principal sum of $261,045.25, plus the additional sum of $79,629.63 by way of interest thereon or upon some part thereof at the rate of four per cent per annum from the date of suit to the date hereof, together with interest upon each of said sums at the rate of seven per cent per annum from the date hereof.

(2) From defendant Shell Oil Company, Inc., the principal sum of $41,388.67, plus the additional sum of $12,625.44 by way of interest thereon or upon some part thereof at the rate of four per cent per annum from the date of suit to the date hereof, together with interest upon each of said sums at the rate of seven per cent per annum from the date hereof.

(3) From Tide Water Associated Oil Company the principal sum of $18,198.95, plus the additional sum of $804.93 by way of interest thereon or upon some part thereof at the rate of four per cent per annum from the date of suit to the date hereof, together with interest upon each of said sums at the rate of seven per cent per annum from the date hereof.

(4) From defendant Union Oil Company of California the principal sum of $47,002.38, plus the

additional sum of $14,337.63 by way of interest thereon or upon some part thereof at the rate of four per cent per annum from the date of suit to the date hereof, together with interest upon each of said sums at the rate of seven per cent per annum from the date hereof.

(5) From defendant Continental Oil Company the principal sum of $231,523.46, plus the additional sum of $31,499.30 by way of interest thereon or upon some part thereof at the rate of four per cent per annum from the date of suit to the date hereof, together with interest upon each of said sums at the rate of seven per cent per annum from the date hereof.

(6) From defendant Seaboard Oil Company of Delaware the principal sum of $224,922.81, plus the additional sum of $29,935.18 by way of interest thereon or upon some part thereof at the rate of four per cent per annum from the date of suit to the date hereof, together with interest upon each of said sums at the rate of seven per cent per annum from the date hereof.

(7) From defendant Honolulu Oil Corporation the principal sum of $35,107.71, plus the additional sum of $4,162.09 by way of interest thereon or upon some part thereof at the rate of four per cent per annum from the date of suit to the date hereof, together with interest upon each of said sums at the rate of seven per cent per annum from the date hereof.

(8) From defendant Standard Oil Company of Texas the principal sum of $35,107.70, plus the ad-

ditional sum of $4,162.08 by way of interest thereon or upon some part thereof at the rate of four per cent per annum from the date of suit to the date hereof, together with interest upon each of said sums at the rate of seven per cent per annum from the date hereof.

(9) From defendant Pacific Western Oil Corporation the principal sum of $49,109.17, plus the additional sum of $3,674.51 by way of interest thereon or upon some part thereof at the rate of four per cent per annum from the date of suit to the date hereof, together with interest upon each of said sums at the rate of seven per cent per annum from the date hereof.

(10) From defendant Pioneer Kettleman Company the principal sum of $10,536.93, plus the additional sum of $708.87 by way of interest thereon or upon some part thereof at the rate of four per cent per annum from the date of suit to the date hereof, together with interest upon each of said sums at the rate of seven per cent per annum from the date hereof.

(11) From defendant George F. Getty, Inc. the principal sum of $3,951.47, plus the additional sum of $634 by way of interest thereon or upon some part thereof at the rate of four per cent per annum from the date of suit to the date hereof, together with interest upon each of said sums at the rate of seven per cent per annum from the date hereof.

(12) From defendant Belmont Investment Company and Cynthia Beal, Neil S. McCarthy, and A.

Calder Mackay as Trustee of said Belmont Investment Company, a Corporation in Process of Dissolution, the principal sum of $30,977.39, together with interest thereon at the rate of seven per cent per annum from the date hereof.

(13) From defendant Ervin S. Armstrong the principal sum of $36,362.47, plus the additional sum of $3,102.64 by way of interest thereon or upon some part thereof at the rate of four per cent per annum from the date of suit to the date hereof, together with interest upon each of said sums at the rate of seven per cent per annum from the date hereof.

(14) From defendants Carrie Estelle Doheny, Lucy Smith Battson and Los Nietos Company the principal sum of $23,949.50, plus the additional sum of $1,909.57 by way of interest thereon or upon some part thereof at the rate of four per cent per annum from the date of suit to the date hereof, together with interest upon each of said sums at the rate of seven per cent per annum from the date hereof.

V.

It is further Ordered and Adjudged that plaintiff have and recover its costs herein from the defendants named in paragraph IV hereof, the same to be taxed by the Clerk of this Court and to be pro-rated among the said several defendants by said Clerk on the basis of the amounts of principal for which said defendants are respectively indebted to plaintiff as specified in said paragraph IV. Said costs are taxed at $294.81 and are pro-rated among the defendants as follows:

General Petroleum Corporation of California	$73.35
Shell Oil Company, Inc.	11.63
Tide Water Associated Oil Company	5.12
Union Oil Company of California	13.21
Continental Oil Company	65.06
Seaboard Oil Company of Delaware	63.20
Honolulu Oil Corporation	9.86
Standard Oil Company of Texas	9.86
Pacific Western Oil Corporation	13.80
Pioneer Kettleman Company	2.96
George F. Getty, Inc.	1.11
Belmont Investment Company and Its Trustees	8.70
Ervin S. Armstrong	10.22
Carrie Estelle Doheny, Lucy Smith Battson and Los Nietos Company	6.73

Dated this 25th day of February, 1947.

/s/ C. E. BEAUMONT
United States District Judge

[Endorsed]: (Exhibit A) Judgment Lodged Feb. 6, 1947. Filed and Entered Feb. 25, 1947.

[Endorsed]: Filed Oct. 12, 1955.

[Title of District Court and Cause.]

ADDENDUM TO STATEMENT OF AGREED FACTS

It is hereby Stipulated and Agreed by and between the parties hereto by their respective counsel as follows:

I.

That the paragraph commencing at line 19 of page 8 of the Statement of Agreed Facts entered into betweeen the parties hereto on August 17, 1955, is amended to read as follows:

"During the period of time involved in this litigation, that is from July 1, 1931 to August 29, 1935, defendant Honolulu Oil Corporation prepared or caused to be prepared on its behalf, and defendant's predecessors in interest prepared or caused to be prepared on their behalf, and submitted to said Frank Kennedy and the plaintiffs herein, monthly statements of the royalties due said Frank Kennedy for the month covered by each such statement, and each month delivered such statement to said Frank Kennedy, accompanied by a check in the amount of such royalties shown to be due for such month; upon the receipt of each such royalty statement and check, Frank Kennedy wrote a letter to the corporation sending such statement and check, stating that by accepting such check he did not wish to be deemed to have agreed to its correctness; that after mailing such letter, each such check was cashed by Frank Kennedy. Such monthly royalty statements

were in the form of Exhibit "EE" to the Statement of Agreed Facts, and such letters sent by Frank Kennedy upon the receipt of the monthly royalty statements and checks were in the form of Exhibit "HH" attached to the Addendum to Statement of Agreed Facts."

II.

That paragraph XVI of said Statement of Agreed Facts is amended to read as follows:

"XVI.

"This Statement of Agreed Facts, as amended by the Addendum to Statement of Agreed Facts, together with the exhibits contained in said file marked "Photostatic Copies of Exhibits 'A' to and including 'GG'," and together with Exhibit 'HH' attached to the Addendum to Statement of Agreed Facts, and the matters admitted by the pleadings, constitute all the material evidence in, and as well the only evidence that will be offered or used by any of the parties to this action, at any trial on the merits of this cause. Nothing herein contained shall be construed as a waiver by any of the parties hereto of their rights to review on appeal any question of law or of fact arising in this action."

Dated: November 11th, 1955.

/s/ PEDDER, FERGUSON & PEDDER,
Attorneys for Plaintiffs

/s/ HERBERT W. CLARK,
Attorney for Defendant

Of Counsel for Defendant:

/s/ Morrison, Foerster, Holloway, Shuman & Clerk

/s/ Alfred L. Gibson

[Endorsed]: Filed November 14, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

To the Defendant above named and to Messrs. Herbert W. Clark and Morrison, Foerster, Holloway, Shuman & Clark, its Attorneys:

You Will Please Take Notice, hereby given, that:

(a) Plaintiffs above named by and through their attorneys hereby move the Court for summary judgment in their favor; and

(b) on November 28, 1955, at the hour of 9:30 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, in the Law and Motion Department of the above-entitled Court, the Honorable George B. Harris presiding, the above named plaintiffs, by and through their undersigned counsel, will present this motion for summary judgment and will move the said Court to enter summary judgment in their favor in the above-entitled action;

in accordance with the provisions of Rule 56(a) and (c) of the Federal Rules of Civil Procedure, on the

ground that the pleadings and the Statement of Agreed Facts with Addendum thereto on file in said action, and the exhibits contained in the file of exhibits which is marked "Photostatic Copies of Exhibits A to and including GG," which is referred to in paragraph V of said Statement of Agreed Facts, show that the said plaintiffs are entitled to judgment as a matter of law.

Dated: November 17, 1955.

/s/ PEDDER, FERGUSON & PEDDER,
Attorneys for Plaintiffs

Acknowledgment of Service attached.

SUMMARY JUDGMENT

This cause having come on for hearing before this Court on November 28, 1955, on the cross-motions of the plaintiffs and the defendant for summary judgment, the said hearing having been specially set for said date, and the said motions having been argued by Kenneth Ferguson, Esq., appearing on behalf of plaintiffs Katharine H. Kennedy and Mark C. Elworthy, and Herbert W. Clark, Esq., appearing for defendant Honolulu Oil Corporation;

And it appearing from the pleadings, exhibits, papers and records on file heren, filed in support of said motion, and from the Statement of Agreed Facts and Addendum thereto on file herein, that no controverted issue of fact remains to be tried by this Court as to whether so much of plaintiffs' complaint and each cause of action thereof as pertains or relates to the period prior to November 21, 1946,

is barred by the applicable statutes of limitations of the State of California;

And it appearing to the Court as a matter of law that so much of said cause of action and each count thereof as pertains or relates to the period of time prior to November 21, 1946, is not and are not barred by the applicable statutes of limitations of the State of California;

It Is Hereby Ordered, Adjudged and Decreed that plaintiffs Katharine H. Kennedy and Mark C. Elworthy, executors of the will of Frank Kennedy, deceased, have judgment against defendant Honolulu Oil Corporation in the sum of $9,519.11 with interest thereon from the period August 29, 1935 to March 30, 1946, at the rate of .....%, and with interest thereon at the rate of 7% from March 30, 1946 to date of judgment.

Dated: ....., 1955.

.....

Judge of the U. S. District Court

[Endorsed]: Filed November 17, 1955.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

Both parties have moved for summary judgment upon an agreed statement of fact. Both parties agree that there are no material facts in contest, and that the only issues are questions of law arising from the stipulated facts. The case is therefore

ripe for decision by summary judgment under Rule 56 F.R.C.P.

This case is a companion case to Kennedy vs. Seaboard Oil Company of Delaware, Civil No. 22469-R, and is based on substantially the same factual situation and with the identical questions of law. In the Seaboard Oil Company case Judge Harris in ruling on a motion to dismiss decided against defendant's main point by declaring that action not barred by the statute of limitations. His decision is reported in 99 F. Supp. 730. In the same case on motion for summary judgment Judge Goodman concurred in the decision of Judge Harris, and awarded judgment to the plaintiff without interest. He determined the interest question adversely to the contention of plaintiff.

Since the only material difference between the Seaboard Oil Company case and the case at bar is the name of the defendant, and since Seaboard was previously decided by this Court, rules of comity require a similar decision in this case. This Court adopts the rulings of Judge Harris and Judge Goodman in the Seaboard case, and awards judgment to the plaintiffs. Paragraphs XIV and XV of the Statement of Agreed Facts in this case provide:

"XIV.

"If the Court shall, upon the evidence agreed to by the parties in this Statement of Agreed Facts and the matters admitted by the pleadings, find that the claim of plaintiffs is barred by any applicable

statute of limitations, then plaintiffs' claim for said sum of $9,519.11 shall be denied and defendant shall have judgment herein.

XV.

"Conversely, if the Court shall, upon the evidence agreed to by the parties in this Statement of Agreed Facts and the matters admitted by the pleadings, find that plaintiffs' claim is not barred by any applicable statute of limitations, then plaintiffs' claim for said sum of $9,519.11 shall be allowed, and plaintiffs shall have judgment against defendant in satisfaction of the accounting prayed for in plaintiffs' complaint, for said principal sum of $9,519.11. In the event that plaintiffs shall so have judgment against defendant as provided in the preceding paragraph of this Statement of Agreed Facts it is understood and agreed that this Statement does not cover the allowance or disallowance of interest thereon, and that:

"(a) plaintiffs shall be free to urge the allowance of interest upon the principal amount of said judgment, or any part thereof, at such rate and in such manner as they shall deem proper; and

"(b) defendant shall be free to resist the allowance of interest in whole or in part, as it may deem proper."

Judgment will be entered for plaintiffs in the sum of $9,519.11, without interest to the date of judgment.

Counsel for plaintiffs shall present an order accordingly.

Dated: December 9, 1955.

/s/ OLIVER J. CARTER,
United States District Judge

[Endorsed]: Filed December 9, 1955.

In the District Court of the United States, Northern District of California, Southern Division

No. 30191

KATHARINE H. KENNEDY and MARK C. ELWORTHY, Executors of the will of Frank Kennedy, deceased, Plaintiffs,

vs.

HONOLULU OIL CORPORATION, a corporation, Defendant.

SUMMARY JUDGMENT

This cause having come on for hearing before this Court on November 28, 1955, on the cross-motions of the plaintiffs and the defendant for summary judgment, the said hearing having been specially set for said date, and the said motions having been argued by Kenneth Ferguson, Esq., appearing on behalf of plaintiffs Katharine H. Kennedy and Mark C. Elworthy, and Herbert W. Clark, Esq., appearing for defendant Honolulu Oil Corporation; And it appearing from the pleadings, exhibits, papers and records on file herein, filed in support of said motion, and from the Statement of Agreed Facts and Addendum thereto on file herein, that no

controverted issue of fact remains to be tried by this Court as to whether so much of plaintiffs' complaint and each cause of action thereof as pertains or relates to the period prior to November 21, 1946, is barred by the applicable statutes of limitations of the State of California;

And it appearing to the Court as a matter of law that so much of said cause of action and each count thereof as pertains or relates to the period of time prior to November 21, 1946, is not and are not barred by the applicable statutes of limitations of the State of California;

It Is Hereby Ordered, Adjudged and Decreed that plaintiffs Katharine H. Kennedy and Mark C. Elworthy, executors of the will of Frank Kennedy, deceased, have judgment against defendant Honolulu Oil Corporation in the sum of $9,519.11 without interest to the date of judgment, and for its costs and disbursements incurred in the above-entitled cause in the amount of $18.40.

Dated: December 16, 1955.

/s/ OLIVER J. CARTER,
United States District Judge

Approved as to form, as provided by Rule 5 (d), FRCP, and receipt of a copy is hereby acknowledged this 14th day of December, 1955.

/s/ HERBERT W. CLARK,
Attorney for Defendant

[Endorsed]: Filed December 16, 1955.

Dated: December 9, 1955.

/s/ OLIVER J. CARTER,
United States District Judge

[Endorsed]: Filed December 9, 1955.

In the District Court of the United States, Northern District of California, Southern Division

No. 30191

KATHARINE H. KENNEDY and MARK C. ELWORTHY, Executors of the will of Frank Kennedy, deceased, Plaintiffs,

vs.

HONOLULU OIL CORPORATION, a corporation, Defendant.

SUMMARY JUDGMENT

This cause having come on for hearing before this Court on November 28, 1955, on the cross-motions of the plaintiffs and the defendant for summary judgment, the said hearing having been specially set for said date, and the said motions having been argued by Kenneth Ferguson, Esq., appearing on behalf of plaintiffs Katharine H. Kennedy and Mark C. Elworthy, and Herbert W. Clark, Esq., appearing for defendant Honolulu Oil Corporation; And it appearing from the pleadings, exhibits, papers and records on file herein, filed in support of said motion, and from the Statement of Agreed Facts and Addendum thereto on file herein, that no

controverted issue of fact remains to be tried by this Court as to whether so much of plaintiffs' complaint and each cause of action thereof as pertains or relates to the period prior to November 21, 1946, is barred by the applicable statutes of limitations of the State of California;

And it appearing to the Court as a matter of law that so much of said cause of action and each count thereof as pertains or relates to the period of time prior to November 21, 1946, is not and are not barred by the applicable statutes of limitations of the State of California;

It Is Hereby Ordered, Adjudged and Decreed that plaintiffs Katharine H. Kennedy and Mark C. Elworthy, executors of the will of Frank Kennedy, deceased, have judgment against defendant Honolulu Oil Corporation in the sum of $9,519.11 without interest to the date of judgment, and for its costs and disbursements incurred in the above-entitled cause in the amount of $18.40.

Dated: December 16, 1955.

/s/ OLIVER J. CARTER,
United States District Judge

Approved as to form, as provided by Rule 5 (d), FRCP, and receipt of a copy is hereby acknowledged this 14th day of December, 1955.

/s/ HERBERT W. CLARK,
Attorney for Defendant

[Endorsed]: Filed December 16, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Honolulu Oil Corporation, a corporation, the defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that part of the Summary Judgment entered in this action on December 16, 1955, which awards to plaintiffs judgment in the sum of $9,519.11, and which adjudges that so much of plaintiffs' cause of action or claim and each count thereof as pertains or relates to the period of time prior to November 21, 1946, is not and are not barred by the applicable statutes of limitations of the State of California.

Dated: January 16, 1956.

/s/ HERBERT W. CLARK,
Attorney for Appellant, Honolulu Oil Corporation

[Endorsed]: Filed January 16, 1956.

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Whereas, Honolulu Oil Corporation, a Corporation, Defendant and appellant in the above entitled action, has appealed to the United States Court of Appeals for the Ninth Circuit from a judgment

made and entered against it in the District Court of the United States for the Northern District of California, Southern Division, in favor of the Plaintiffs in said action, on the 16th day of December, 1955, and

Whereas, the said appellant is required to give an undertaking for costs on appeal as hereinafter conditioned,

Now, Therefore, Hartford Accident and Indemnity Company of San Francisco, California, in consideration of the premises, hereby undertakes on the part of the said appellant and acknowledges itself bound to the said Plaintiffs in the sum of Two Hundred Fifty and No/100 Dollars ($250.00) that the said appellant will pay all costs which may be adjudged against it on said appeal, or on a dismissal thereof, and such costs as the Appellate Court may award if the judgment be modified, not exceeding, however, the sum of Two Hundred Fifty and No/100 Dollars ($250.00).

It Is Further Stipulated as a part of the foregoing undertaking that in case of the breach of any condition thereof, the above entitled District Court may, upon notice to the Surety of not less than 10 days, proceed summarily in said proceedings to ascertain the amount which the said surety is bound to pay on account of such breach and render judgment therefore against the said surety and award execution thereof.

Signed, sealed and dated this 16th day of January, 1956.

[Seal] /s/ HARTFORD ACCIDENT AND INDEMNITY COMPANY,
/s/ By TREVOR R. LEWIS,
Attorney-in-Fact

Notary Public's Certificate attached.

[Endorsed]: Filed January 16, 1956.

[Title of District Court and Cause.]

STIPULATION DISPENSING WITH BONDS ON APPEAL

It Is Hereby Stipulated by and between the parties hereto, through their respective attorneys, that the bonds on appeal under Rules 73(c) and 73(d) of the Federal Rules of Civil Procedure may be dispensed with in connection with defendant's appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered herein on December 16, 1955, and the defendant is hereby relieved from the necessity of filing any such bonds.

Dated: January 12, 1956.

/s/ PEDDER, FERGUSON & PEDDER,
Attorneys for Plaintiffs
/s/ HERBERT W. CLARK,
Attorney for Defendant

So ordered this 16 day of January, 1956.

/s/ OLIVER J. CARTER,
Judge of the United States
District Court

[Endorsed]: Filed January 16, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

Excerpt from Docket Entries.

Complaint.

Answer of Defendant.

Statement of Agreed Facts, with exhibits attached.

Notice and Motion by Defendant for Summary Judgment, with copy of proposed judgment attached.

Affidavit of Herbert W. Clark, with copy of Judgment from Southern District of California attached.

Addendum to Statement of Agreed Facts, with

copy of letter to Pacific Western Oil Company attached.

Notice and Motion by Plaintiffs for Summary Judgment. with copy of proposed judgment attached.

Memorandum and Order of Court for Judgment for Plaintiff.

Summary Judgment.

Notice of Appeal.

Bond on Appeal.

Stipulation Dispensing with Bonds on Appeal.

Appellant's Designation of Record on Appeal.

Statement of Points Upon Which Appellant Intends to Rely on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 21st day of February, 1956.

[Seal] /s/ C. W. CALBREATH,
Clerk
/s/ By MARGARET P. BLAIR,
Deputy Clerk

[Endorsed]: No. 15049. United States Court of Appeals for the Ninth Circuit. Honolulu Oil Corporation, Appellant, vs. Katharine H. Kennedy and Mark C. Elworthy, Executors of the Will of Frank Kennedy, deceased, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: February 28, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15049

HONOLULU OIL CORPORATION, a corporation, Appellant,

vs.

KATHARINE H. KENNEDY and MARK C. ELWORTHY, Executors of the Will of Frank Kennedy, deceased, Appellees.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY

The points upon which appellant intends to rely on this appeal are:

1. The Court below erred in adjudging that so much of appellees' cause of action or claim and each count thereof as pertains or relates to the

period of time prior to November 21, 1946, is not and are not barred by the applicable statutes of limitations of the State of California.

2. The Court below erred in holding that a relationship, or any relationship, of co-tenancy or co-adventure existed between Frank Kennedy, or any of the appellees herein, on the one hand, and appellant, or any of its predecessors in interest, on the other hand.

3. The Court below erred in holding that there is or was any confidential relationship, or any fiduciary relationship, existing between Frank Kennedy, or any of the appellees herein, on the one hand, and appellant, or any of its predecessors in interest, on the other hand.

4. The Court below erred in holding that any relationship of trust and confidence, or trust or confidence, existed between Frank Kennedy, or any of the appellees herein, on the one hand, and appellant, or any of its predecessors in interest, on the other hand.

5. The Court below erred in awarding appellees damages in the sum of $9,519.11, or in any sum whatsoever.

Dated: February 27th, 1956.

/s/ HERBERT W. CLARK,
Attorney for Appellant Honolulu Oil Corporation

Acknowledgment of Service attached.

[Endorsed]: Filed Mar. 1, 1956. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF RECORD

Pursuant to Rule 17(6) of the Rules of the United States Court of Appeals for the Ninth Circuit, appellant Honolulu Oil Corporation designates as material to the consideration of this appeal the following portions of the record, proceedings and evidence:

1. Complaint.

2. Appellant's Answer to Complaint.

3. Statement of Agreed Facts.

4. Photostatic copies of Exhibits A to and including GG, accompanying said Statement of Agreed Facts.

5. Appellant's Notice of Motion and Motion for Summary Judgment.

6. Affidavit of Herbert W. Clark.

7. Addendum to Statement of Agreed Facts.

8. Appellees' Notice of Motion and Motion for Summary Judgment.

9. Memorandum and Order of the Court below of December 9, 1955.

10. Summary Judgment entered by the Court below on December 16, 1955.

11. Notice of Appeal filed on January 16, 1956.

12. Stipulation Dispensing with Bonds on Appeal filed on January 16, 1956.

13. Bond for Costs on Appeal filed on January 16, 1956.

14. Designation of Record on Appeal.

Dated: February 27th, 1956.

/s/ HERBERT W. CLARK,
Attorney for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed Mar. 1, 1956. Paul P. O'Brien, Clerk.

No. 15,049

United States Court of Appeals

For the Ninth Circuit

HONOLULU OIL CORPORATION,
a corporation,
Appellant,

vs.

KATHARINE H. KENNEDY and MARK C. ELWORTHY, Executors of the Will of Frank Kennedy, Deceased,
Appellees.

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

HERBERT W. CLARK,
Crocker Building, San Francisco 4, California,
Attorney for Appellant
Honolulu Oil Corporation.

Of Counsel:
MORRISON, FOERSTER, HOLLOWAY,
SHUMAN & CLARK,
A. L. GIBSON.
Crocker Building, San Francisco 4, California,

Table of Contents

INDEX

Table of Cases

Statutes

Texts

No. 15,049

United States Court of Appeals

For the Ninth Circuit

HONOLULU OIL CORPORATION,
a corporation,
Appellant,

vs.

KATHARINE H. KENNEDY and MARK C. ELWORTHY, Executors of the Will of Frank Kennedy, Deceased,
Appellees.

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

STATEMENT OF JURISDICTION.

This is an appeal by Honolulu Oil Corporation ("Honolulu"), defendant below, from a summary judgment entered against it by the District Court on December 19, 1955, awarding to the executors of the will of Frank Kennedy, deceased, plaintiffs below, damages in the sum of $9,519.11 (R. 78).

Jurisdiction of the District Court was founded upon the provisions of Section 1332 of Title 28, United States Code, it being averred in paragraph III, p. 2

of the Complaint (R. 4) that at all relevant times Kennedy and each of the executors of his will were and are citizens of the State of California, and that defendant below, Honolulu Oil Corporation, is and was a citizen of the State of Delaware, and that the amount in controversy in the action exceeds, exclusive of interest and costs, the sum of $3,000.00. These averments were admitted by paragraph I, page 1 of the answer of Honolulu (R. 29). Jurisdiction of this court is founded upon the provisions of Section 1291 of Title 28, United States Code, in that the summary judgment entered by the District Court against appellant Honolulu on December 19, 1955, was a final decision of the District Court of the United States for the Northern District of California, Southern Division.

STATEMENT OF THE CASE.

For convenience and to the extent practicable, the executors of the will of Kennedy, plaintiffs below, will be herein referred to as appellees, and the defendant below will be herein referred to as Honolulu.

Appellees are executors of the will of one Frank Kennedy who died October 4, 1946 (R. 3). They are suing on behalf of Kennedy's estate for damages on account of alleged underpayments to Kennedy in his lifetime of various oil royalties by Honolulu and its predecesors in interest. These royalties were payable to Kennedy by reason of his ownership, during his lifetime, of certain interests in oil and gas bearing

properties. Kennedy assigned these interests to the predecessors in interest of Honolulu, which agreed to pay Kennedy various royalties if oil or gas were discovered and produced by them from the subject lands. Honolulu succeeded to the rights and liabilities of its predecessors in interest in regard thereto.

Appellees claim that due to an artificially depressed price for oil in the area involved, some of these royalty payments were not based upon the true value of the oil, and that hence they are entitled to an accounting for additional royalties for the period July 1, 1931 to August 29, 1935 (R. 53).

This action was commenced November 1, 1950 (R. 28), and the additional royalties, if any, became due at a peroid of time long prior to four years before the commencement of this action. It is conceded by the parties that the applicable statutes of limitation of the State of California have long since barred recovery, unless some fiduciary relationship existed between Kennedy and Honolulu or its predecessors in interest which would have prevented the running of the statute. The complaint avers the existence of a fiduciary relationship in a number of ways, and the answer denies the existence of any such relationship, and it is upon this principal issue that the case was decided below and upon which this appeal is taken.

A. The Complaint.

This action was commenced by the filing by appellees on November 21, 1950 (R. 28), in the District

Court of a complaint for an accounting and a money judgment from Honolulu on account of various royalty payments by Honolulu or its predecessors in interest to Frank Kennedy, which appellees aver did not represent the true value of the oil and gas produced by Honolulu or its predecessors from certain lands in which Kennedy had an interest (Complaint, par. XVI; R. 21).

Stating the pertinent averments of the complaint in summary form, it is therein averred (par. IV, p. 2 and elsewhere in the Complaint; R. 4-5) that Frank Kennedy on January 6, 1927, was the owner in fee of certain land in Fresno County described as follows:

> The South West Quarter (SW¼) of
> Section 22, Township 21 South,
> Range 17 East, M.D.B.&M.

This property will be hereinafter referred to as the "Kennedy fee land".

The complaint further avers (par. V; R. 5-7) that Kennedy was also the owner of certain oil and gas prospecting permits, rights and leases in other lands in the County of Fresno, State of California; Kennedy did not own these lands in fee but had operating rights therein by virtue of such prospecting permits and leases. These properties will be hereinafter referred to as the "Kennedy lease lands".

It is alleged (Complaint, par. V and elsewhere in the Complaint; R. 5-7) that Frank Kennedy entered into an arrangement of "coadventure" with

Kettleman Oil Corporation, a predecessor in interest of Honolulu, and that said arrangement of coadventure was embodied primarily in Exhibits A, B, C, D and E attached to the complaint; that Kennedy and Kettleman Oil Corporation were coadventurers and cotenants in the production of oil and gas from both the Kennedy fee land and the Kennedy lease lands. The complaint alleges the production of oil and gas from these lands and that pursuant to the provisions of the above lettered exhibits, Kennedy was entitled to various reserved and overriding royalties therefrom (Complaint, par. XII; R. 16-19). Later we shall have occasion to examine these averments of the complaint and the pertinent exhibits in greater detail.

The complaint further avers (pars. VI, VII, VIII and IX; R. 7-13) various mesne assignments and transfers of these lands and leases, it being averred that Honolulu succeeded to and assumed all the liabilities and obligations of its predecessors in interest under these assignments and transfers. Appellees averred that by reason of the execution of the documents attached to the complaint as Exhibits A through E inclusive, and the subsequent mesne assignments and transfers, the predecessors in interest of Honolulu became coadventurers and cotenants with Frank Kennedy in the lands and leases described in the complaint (Complaint, par. XII; R. 16-19) and that appellant Honolulu, as the successor in interest of all or some of the parties to these documents, occupies the same fiduciary relationship to Frank Kennedy and to appellees as did Honolulu's predecessors in interest.

The second claim or cause of action in the complaint (beginning at R. 25) seeks an accounting from Honolulu; the third claim or cause of action therein (beginning at R. 26) avers that Frank Kennedy reposed the greatest trust and confidence in Honolulu and its predecessors in interest and relied upon the royalty payments made by Honolulu and its predecessors as being full, true and correct which they were not in fact.

Although this action was not filed until November 21, 1950 (R. 28), the complaint does not indicate to what period of time it is addressed with respect to the alleged underpayments of royalty sought to be recovered, and on its face would apparently carry back to the time of the execution of the original leases and other arrangements entered into between Kennedy and appellant's predecessors in interest in January of 1927. The fact is, however, that no claim is made for any period other than the period July 1, 1931 to August 29, 1935 (R. 53).

B. The Answer to the Complaint.

Honolulu's answer to the complaint (R. 29) admits the due execution and delivery of all documents attached as exhibits to the complaint and admits Kennedy's ownership in fee of the Kennedy fee land, and admits his ownership of an interest by way of prospecting permits, leases and other arrangements in the Kennedy lease lands. In brief, the answer, however, expressly denies each and every averment of the complaint which states that any arrangement of

coadventure, cotenancy, trust and confidence, or fiduciary relationship of any other kind or character ever existed between Frank Kennedy or the appellees herein, on the one hand, and appellant Honolulu and its predecessors in interest on the other hand. The answer denies that any or all of such relationships were created by virtue of all or any of the documents attached to the complaint as exhibits, and denies that such relationships existed for any other reason whatsoever.

The answer further raises the defense that the claim of appellees, and each cause of action or count thereof, is and are barred by the applicable statutes of limitation of the State of California, to wit, Subdivision 1 of Section 337 of the Code of Civil Procedure of the State of California and Section 343 of the Code of Civil Procedure of the State of California.

An additional defense of accord and satisfaction is pleaded as a third affirmative defense to the complaint (Answer; R. 43).

C. The Statement of Agreed Facts.

On August 17, 1955, there was filed in the cause a Statement of Agreed Facts (R. 45-57). Accompanying this Statement of Agreed Facts is a file of photostatic copies of documents entitled "Photostatic Copies of Exhibits 'A' to and including 'GG' ". All exhibits to the complaint are incorporated in this file of photostatic copies, together with certain other documents which will be later referred to herein. These documents have been transmitted to this court without

being printed in the record by reason of the number and length of the exhibits.

On November 14, 1955, there was filed in the action an addendum to the Statement of Agreed Facts (R. 71-73) to which reference will later be made.

The Statement of Agreed Facts and addendum thereto may be summarized briefly as follows:

1. The parties agree that appellees are the executors of the will of Frank Kennedy and entitled to bring this action; they are residents of the State of California and Honolulu is a Delaware corporation; the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

2. On January 6, 1927, Kennedy owned in fee the so-called Kennedy fee land, to wit, the Southwest Quarter (SW¼) of Section 22, Township 21 South, Range 17 East, M.D.B.&M.

3. Kennedy owned an United States Oil and Gas Prospecting Permit bearing Serial No. Visalia 09551 issued by the United States General Land Office, Department of the Interior, on May 28, 1921, which Kennedy acquired by assignment from the original owner; that this permit was subsequently renumbered Sacramento 019438, and that it covered some 2556.58 acres of land in Fresno County. This permit ripened into United States oil and gas leases numbered Sacramento 019438(c) and Sacramento 019438(d), and also into other oil and gas leases which, however, are not involved in this litigation.

4. There is attached to the Statement of Agreed Facts a file of photostatic copies of documents marked Exhibits "A" to and including "GG", and the original of each of these instruments was, on or about the date that each exhibit bears, executed and delivered to the persons, firms or corporations therein named. (Statement of Agreed Facts, pars. V and VI; R. 47, 48).

5. The Statement of Agreed Facts, par. V (R. 47-48) provides as follows:

> "The said Exhibits 'A' to and including 'GG' contained in said file so entitled and marked, are all the written, typed, or printed documents, letters and materials (except this Statement of Agreed Facts, matters admitted by the pleadings herein, statutes, regulations, adjudicated cases and matters of which this Court will take judicial notice) which have pertinency, relationship of any kind or materiality whatsoever to and in respect of any question arising in this litigation. The said exhibits in said file so entitled and marked are believed to be true, correct and complete copies of the originals of said Exhibits 'A' through 'GG' and they, or such substitutes therefor as counsel may agree upon in writing, shall be considered by Court and counsel in this action as and in lieu of the originals."

6. The royalties paid and payable to Frank Kennedy and appellees by appellant Honolulu and its predecessors in interest were only payable by reason of the terms, conditions and provisions of the aforementioned exhibits as they may severally relate to

either all or a specified part of the lands and interests in lands described in the Statement of Agreed Facts (par. VII; R. 48-51). The description of the lands in which Kennedy had an inteerst covers two categories of property: (a) the Kennedy fee land; and (b) the Kennedy lease lands; the latter being lands which Kennedy did not own but as to which he had reserved overriding royalties upon assignment by him of the interests which he had acquired under the above described oil and gas prospecting permits and the leases into which said permits ripened.

7. Appellant Honolulu, as successor in interest of Kettleman Oil Corporation, Ltd., Pacific Western Oil Company, and Kettleman and Inglewood Corporation, succeeded to all the rights and liabilities of these corporations in the subject lands, and now stands in the same position to Kennedy and appellees as did Honolulu's aforementioned predecessors in interest (Statement of Agreed Facts, par. VIII; R. 51).

8. Appellant Honolulu is engaged in the business of exploring, drilling and developing lands for oil and gas and in selling the crude products to others, but it has never been engaged in the business of refining crude oil or in selling the refined products therefrom. All of Honolulu's share of the oil production involved in this litigation was sold by appellant or its predecessors in interest in its crude state to other oil companies who purchased it, and the prices accepted by appellant Honolulu or its predecessors for such crude products were the prices offered and paid by

the oil companies purchasing at the place of production, and appellant and its predecessors in interest accepted the highest prices offered and paid for such oil and did not participate in any way in deciding or determining what prices would be paid by the purchasing companies for such products (Statement of Agreed Facts, par. IX; R. 51-52).

9. Appellant Honolulu and its predecessors in interest accounted to Kennedy and appellees at a royalty rate based and computed upon the prices received by appellant and its predecessors from the oil companies above referred to, and the mathematical computation of such payments made by appellant and its predecessors was and is correct. Appellant Honolulu and its predecessors represent and contend that such payments are the full payments to which Kennedy and appellees are and were entitled; whereas, appellees contend that during the period commencing July 1, 1931 and ending August 29, 1935, such payments were not the full or proper royalties. During this period Honolulu and its predecessors submitted to Kennedy monthly royalty statements accompanied by a check for such monthly royalty amounts and the checks were retained and cashed by Kennedy (Statement of Agreed Facts, par. X; R. 52-53).

10. Appellees' action and claimed right of recovery involves only (a) the production of crude oil, and (b) payments of royalty thereon *during the period of time beginning July 1, 1931 to and including August 29, 1935* (Statement of Agreed Facts, par. XI; R. 53-54).

11. All oil involved in this litigation was produced from lands, the operating rights to which had been transferred and set over to Kettleman North Dome Association. The lands subject to the Association are depicted on a certain map or plat attached to Exhibit "Y", which is one of the photostatic copies accompanying the Statement of Agreed Facts. This map or plat delineates two areas which are so-called "participating areas" and "non-participating areas." Lands included in the former were entitled to an allocation of royalties from all oil produced within the lands operated by the Association; whereas, lands in the "non-participating areas" were not, merely because of their inclusion in the Kettleman North Dome Association, entitled to any royalties unless there was actual production from such lands. There never was any actual production from the Kennedy fee land; the north half of the Kennedy fee land lay within the "non-participating areas" of the Association and, there never having been actual production from said land, it was not entitled to any allocation of royalties. The south half of the Kennedy fee land did lie within the "participating areas", but since Kennedy never consented to the inclusion of this south half in the Kettleman North Dome Association Unit Agreement, he was not entitled to the allocation of any production to the south half of his fee land. No production from the Kennedy fee land nor any proceeds from such production is or are involved in this litigation. This leaves as the sole source of any allocation of royalties the Kennedy lease lands. (Statement of Agreed Facts, par. XII; R. 54-55).

(The importance of this fact will become apparent in our discussion of the legal principles involved.)

12. The amount to which appellees are entitled if the statute of limitations has not run against their claim is the sum of $9,519.11, but if the applicable statutes of limitations of the State of California, or any of them, have barred their claim, then they are entitled to nothing. The Statement of Agreed Facts, the pleadings and the matters admitted therein, and the documents attached as Exhibits "A" to and including "GG", are all the material evidence in the case.

It is evident that since the appellees' claim for additional royalties covers only the period from July 1, 1931 to and including August 29, 1935, and since the present action was not commenced until November of 1950, the statute of limitations has long since run on the asserted cause of action, unless the statute never commenced to run because of the existence of some fiduciary relationship between Kennedy and the predecessors in interest of the appellant Honolulu.

D. The Present Posture of the Case.

It will be of assistance to this Court in the determination of this appeal to review the events leading up to the rendition by the Court below of its summary judgment in favor of appellees, which was entered on December 19, 1955.

On October 12, 1955, appellant filed herein a notice of motion and motion for summary judgment accompanied by the affidavit of Herbert W. Clark (R. 58,

60), said motion being made upon the ground that it appeared from the pleadings, the Statement of Agreed Facts and exhibits thereto annexed, and the said affidavit accompanying the motion that Honolulu was entitled to judgment as a matter of law. Thereafter, and on or about November 18, 1955, appellees herein filed a counter notice of motion and motion for summary judgment (R. 73) on the ground that it appeared as a matter of law that they were entitled to summary judgment. Said motions were noticed for hearing before the Court below, Judge Carter sitting, on November 28, 1955. At the time of that hearing it was called to the attention of Judge Carter by counsel for Honolulu that a case entitled "*Kennedy v. Seaboard Oil Company of Delaware*", Civil Action No. 22469-R, had been decided by Judge Harris of the United States District Court for the Northern District of California, Southern Division (reported in 99 Fed. Supp. 730); that this case involved the same basic documents and agreements as are involved in the present action, that case being an action by Kennedy against the Seaboard Oil Company, one of the other operating companies producing oil from lands in which Kennedy had an interest; that on September 6, 1951, Judge Harris in that action denied Seaboard's motion to dismiss on the ground that the complaint showed that the cause of action was barred by the statute of limitations. Judge Carter was further advised by counsel for Honolulu that after Seaboard's motion to dismiss had been denied, the parties entered into a Statement of Agreed Facts similar to the one in this action, and that thereafter counter

motions for summary judgment in the *Seaboard* case were heard before Judge Goodman. Judge Goodman in the *Seaboard* case, upon the hearing of the counter motions for summary judgment, referred to the order of Judge Harris on the motion to dismiss, which held that the action was not barred by the California statute of limitations, and concluded that both by reason of comity and also because of the evidence agreed to by the parties in the Statement of Agreed Facts, the action was not barred by the statute of limitations. Judge Goodman therefore granted summary judgment in favor of the plaintiffs in the *Seaboard* case.

These matters having been presented by counsel for Honolulu to Judge Carter in the Court below, he concluded in his Memorandum and Order of December 9, 1955 (R. 75), that comity required him to follow the decision in the *Seaboard* case and grant summary judgment in favor of appellees. Judge Carter did not independently consider whether the claim of appellees herein was barred as a matter of law; he concluded that the only material difference between the *Seaboard* case and the case at bar was the difference in defendants, and that therefore rules of comity required a similar decision in this case.

Appellant Honolulu does not rest this appeal on the ground that the Court below erred in following the decision of the District Court in the *Seaboard* case as a matter of comity, although it clearly was not bound to do so.

Dictograph Products Company v. Sonotone Corporation, 230 Fed.2d 131 (C.A. 2, 1956)

Appellant Honolulu does contend that the judgment appealed from is erroneous for the reason that the decision and order of Judge Goodman relied upon by the Court below in the instant action, and followed by it as a matter of comity, were and are erroneous in determining that any fiduciary relationship existed between the parties to that case, and hence the decision of the Court below in the instant action was equally erroneous in necessarily determining that a fiduciary relationship existed between the parties to the instant action.

It is significant that in the *Seaboard* litigation the decision of Judge Harris was made on a motion to dismiss, and at a time when it would have been possible, upon a trial of the action, for the plaintiffs therein to have shown that a fiduciary relationship between the parties arose out of facts extraneous to the various leases, assignments and other documents attached as exhibits to the complaint in that action. Upon the motion for summary judgment in the *Seaboard* case, however, the Statement of Agreed Facts in that action precluded the existence of any such fiduciary relationship unless it arose out of the documents attached to the complaint as exhibits. Judge Goodman, however, in deciding the cross-motions for summary judgment in the *Seaboard* case, adopted the reasoning of Judge Harris in his order made upon the motion to dismiss. The posture of the case at the time of the motion to dismiss, and at the time of the cross-motion for summary judgment in the *Seaboard* case, was entirely different. This is

for the reason that at the time of the motion to dismiss there might have been evidence extraneous to the pleadings and exhibits which, if presented at a trial of the case, would have disclosed that a fiduciary relationship existed between the parties; at the time of the cross-motion for summary judgment, however, it was clear, under the Statement of Agreed Facts, that the *only* way in which plaintiffs in that case could show the existence of any fiduciary relationship was by demonstrating that such relationship was created by one or more of the documents attached to the complaint and exhibits.

The latter is now the precise situation in this case. Since the filing of the Statement of Agreed Facts herein, the "arrangement" of coadventure or cotenancy alleged by appellees to have existed between Kennedy and appellant's predecessors in interest must be found, if it exists at all, in some of or all the documents constituting Exhibits "A" to "GG" inclusive of the photostatic copies of exhibits accompanying the Statement of Agreed Facts.

Unless, therefore, one or more of these documents created a fiduciary relationship of some sort between Kennedy and appellant's predecessors in interest, it is clear that the statute of limitations has long since run on the appellees' claims and, hence, the judgment appealed from is erroneous and should be reversed.

We shall examine this proposition in detail later in this brief when commenting upon the various exhibits in question.

The attention of the Court is invited to the fact that the third cause of action of the complaint (par. II; R. 26) avers that Frank Kennedy at all times reposed the greatest confidence and trust in appellant and its predecessors in interest and in their representations that the payments made by them to Kennedy as royalties were full, true and correct, and that Kennedy relied upon such representations. Appellant's answer denies the averments concerning such fiduciary relationship, trust, confidence and reliance and because of such denials, the averments of trust, confidence and reliance are now out of the case, since it is expressly agreed in the Statement of Agreed Facts that, so far as the pleadings are concerned, only "the matters *admitted* by the pleadings" constitute material evidence in this case (Statement of Agreed Facts, par. XVI; R. 57).

This means that no concealment has been nor can be shown; no "trust, confidence and reliance" can be presumed; and no fraud has been averred by the appellees. It is clear, therefore, that the appellees must rely upon the contents of the exhibits or some of them to spell out their theory of fiduciary relationship.

THE QUESTIONS INVOLVED ON THIS APPEAL.

The questions involved on this appeal are:

1. Did the Court below err in adjudging that so much of appellees' cause of action or claim and each count thereof as pertains or relates to the period of

time prior to November 21, 1946, is not and are not barred by the applicable statutes of limitations of the State of California?

2. Did the Court below err, in necessarily holding in order to reach its determination, either that (a) a relationship of cotenancy or coadventure existed between Frank Kennedy or any of appellees herein, on the one hand, and appellant Honolulu or any of its predecessors in interest, on the other hand; or (b) that there was a confidential relationship, or any fiduciary relationship existing between Frank Kennedy or any of appellees herein, on the one hand, and appellant Honolulu or any of its predecessors in interest, on the other hand; or (c) that a relationship of trust and confidence, or trust or confidence, existed between Frank Kennedy or any of appellees herein, on the one hand, and appellant Honolulu or any of its predecessors in interest, on the other hand?

3. Did the Court below err in awarding appellees damages in the sum of $9,519.11 or in any sum whatsoever?

The manner in which these questions are raised is by an examination of the Statement of Agreed Facts on file herein, the photostatic copies of Exhibits "A" to and including "GG" accompanying said statement, and the matters admitted by the pleadings.

ARGUMENT.

POINT ONE.

THE COURT BELOW ERRED IN ADJUDGING THAT SO MUCH OF APPELLEES' CAUSE OF ACTION OR CLAIM AND EACH COUNT THEREOF AS PERTAINS OR RELATES TO THE PERIOD OF TIME PRIOR TO NOVEMBER 21, 1946, IS NOT AND ARE NOT BARRED BY THE APPLICABLE STATUTES OF LIMITATIONS OF THE STATE OF CALIFORNIA.

This is simply another way of stating that appellees' entire cause of action is barred by the statute of limitations, since the claim of appellees is limited to that period of time between July 1, 1931 to and including August 29, 1935 (Statement of Agreed Facts, par. XI; R. 53-54). Appellees make no claim on account of underpayment of royalties after August 29, 1935. The money judgment in the sum of $9,519.11 awarded to appellees and herein appealed from by Honolulu relates only to such period of time; neither the whole nor any part of said amount is allocable to any period of time other than that from July 1, 1931 to and including August 29, 1935. The whole judgment therefore must stand or fall upon the answer to the question of whether appellees' cause of action was or was not barred by the applicable statutes of limitations of the State of California four years after the latter date, to wit, August 30, 1939.

The applicable statutes of limitations of the State of California are:

(a) Subdivision 1 of Section 337 of the Code of Civil Procedure of the State of California, which provides a four-year period of limitation for:

> "An action upon any contract, obligation or liability founded upon an instrument in writing, * * *."

(b) Section 343 of the Code of Civil Procedure of the State of California which reads as follows:

> "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

Whether appellees' cause of action be founded upon obligations arising out of a written instrument, or be cast in the form of a suit for accounting, it is barred by the above quoted sections of the California statute unless commenced within four years.

> *Alamitos Land Co. v. The Texas Company,* 11 C.A.2d 614, 618; 54 Pac.2d 489 (1936);
>
> *West v. Russell,* 74 Cal. 544; 16 Pac. 392 (1888).

Appellees concede that their cause of action and claim is barred on its face by the statute of limitations, and that hence the judgment appealed from is erroneous, unless the Court below was correct in determining that some sort of fiduciary relationship prevented the running of the statute. To demonstrate that the Court below erred in adjudging that the claim was not statute barred, appellant Honolulu will next take up the various grounds—in fact, the only grounds—upon which the Court below could have rested its determination that the claim was not statute barred.

POINT TWO.

THE COURT BELOW ERRED IN HOLDING, IN ORDER TO REACH THE RESULT THAT APPELLEES' CLAIM WAS NOT BARRED BY THE STATUTE OF LIMITATIONS, THAT ANY RELATIONSHIP OF COTENANCY, COADVENTURE, CONFIDENTIAL RELATIONSHIP, FIDUCIARY RELATIONSHIP, OR RELATIONSHIP OF TRUST OR CONFIDENCE, OR ANY ONE OR MORE OF SUCH RELATIONSHIPS, EVER EXISTED BETWEEN FRANK KENNEDY OR THE APPELLEES HEREIN, ON THE ONE HAND, AND APPELLANT HONOLULU OR ANY OF ITS PREDECESSORS IN INTEREST, ON THE OTHER HAND.

The judgment of the Court below is necessarily predicated upon the judgment of Judge Harris on the motion to dismiss in the case of *Kennedy v. Seaboard Oil Company* heretofore referred to, and reported in 99 Fed. Supp. 730. We shall hereafter examine this decision, but since any holding of the Court below as to the existence of any relationship of cotenancy, coadventure or other fiduciary relationship between the parties is necessarily predicated upon the proposition that such relationship was created by the various contracts and agreements between the parties (all of which are included in the file of exhibits), we must first examine the pertinent documents before turning to the applicable law.

A. The Exhibits.

As we have already stated, but cannot too strongly emphasize, if any fiduciary relationship of whatever kind existed between Frank Kennedy and appellant's predecessors in interest it must have been created by, or must have arisen by reason of, various assignments, leases, contracts and other agreements between the parties, all of which are embodied in the file of

photostatic copies of Exhibits "A" through "GG" inclusive. We will therefore examine these. Before doing this, however, it is appropriate and correct to state that in none of the exhibits which relate to the so-called Kennedy lease lands is there to be found anything which accords to Kennedy or his executors any right to enter into possession or occupancy of any of the described so-called Kennedy lease lands for any purpose whatsoever or at all. In brief, appellant Honolulu and its predecessors in interest have and had the right to "* * * hold, enjoy and exercise the exclusive right to demand and under its terms to enter into possession and occupancy of * * *" such lands for the purpose of drilling and producing oil and gas therefrom. Now to examine Exhibits "A" through "G" inclusive in detail.

Exhibit "A". Exhibit "A" in the special folder accompanying the Statement of Agreed Facts is a copy of a grant deed dated January 6, 1927 by which Frank Kennedy and his wife granted to Kettleman Oil Corporation the Southwest Quarter of Section 22, Township 21 South, Range 17 East M.D.B.&M. (the Kennedy fee land). By it Kennedy conveyed *all* the property, reserving to himself and wife, however, 4½% of all the oil, casinghead gasoline and natural and dry gas (after deducting the costs of manufacture) produced and saved from a portion of the conveyed area; this deed also reserved 2½% of said hydrocarbon products produced and saved from another portion of the conveyed area. This deed further provided as follows:

> "All the terms and conditions of this reservation and/or exception shall be binding upon and inure to the benefit of the heirs, administrators, successors and assigns of the respective parties hereto and shall be construed as covenants running with the said lands hereinabove described."

This instrument shows that Kennedy and his wife were owners in fee of the property, all of which they conveyed to Kettleman Oil Corporation, reserving 4½% and 2½% of the oil and gas. The grantors thus reserved to themselves a portion of the "oil and gas estate", the balance of which was conveyed to the grantee. The legal effect of this deed will be discussed later.

Exhibit "B". Exhibit "B" is a copy of an assignment dated January 6, 1927, from Frank Kennedy to Kettleman Oil Corporation, whereby Kennedy assigned to Kettleman Oil Corporation "all his right, title and interest of every kind and nature" in and to United States Oil and Gas Prospecting Permit Serial No. Visalia 09551, covering the described property in Fresno County, which aggregated some 2556.58 acres (a portion of the Kennedy lease lands). The assignment further provides that Kettleman Oil Corporation, its successors and assigns, should hold, enjoy and exercise "the exclusive right to demand and under its terms to enter into possession and occupancy of the said lands for all purposes". This provision covered not only the permit but all extensions thereof. The assignee, Kettleman Oil Corporation, in consideration of this assignment agreed to *pay*

to Kennedy an overriding royalty equal to 5% of all the oil produced and saved from such portions of the lands as to which the United States might grant to Kettleman Oil Corporation a preferential 5% lease; Kettleman was to pay to Kennedy an overriding royalty of 3% as to all lands on which the United States granted to Kettleman a lease at a minimum royalty of 12½%. This agreement in turn provided that these provisions should be construed as "a reservation of the aforesaid overriding royalties and as covenants running with the said lands".

This instrument discloses that Kettleman had the exclusive right to go upon and operate the property, and its duty thereunder was to *pay* the stipulated royalties to Kennedy.

This agreement further provided for an additional overriding royalty of 2% to Kennedy on certain other lands, to wit, the northeast quarter of Section Twenty; the north half of Section Thirty; the north half of Section Twenty-eight, and the north half of the northeast quarter of Section Thirty-two, all in Township 21 South, Range 17 East, M.D.B.&M. (a portion of the Kennedy lease lands).

Exhibit "C". This document is an overriding royalty agreement dated January 6, 1927, between Kennedy and Kettleman Oil Corporation reciting that Kennedy had on that date assigned to Kettleman Oil Corporation all his right, title and interest in United States Oil and Gas Prospecting Permit No. Visalia 09551 (subject to the overriding royalties therein provided), and it recites that Kettleman has

agreed to sell and transfer to Kennedy additional royalties. The assignment then provides that Kettleman sells, assigns and transfers to Kennedy an overriding royalty of 2% on certain other lands therein described, that is, lands in which Kettleman had the operating rights but in which Kennedy had no interest whatever. This document created an obligation on the part of Kettleman to pay to Kennedy a royalty in an amount equal to 2% of the production from said lands and nothing more. These lands, the description of which is omitted for brevity, are also referred to herein as the Kennedy lease lands.

Exhibit "D". This is a supplementary overriding royalty agreement dated December 6, 1928, reciting the execution of the overriding royalty agreement of January 6, 1927 (Exhibit "C") and provides that Kettleman agrees to pay to Kennedy an *additional* overriding royalty of 2% on certain other lands described in Exhibit "D", the description of which is omitted for brevity. These are also referred to as the Kennedy lease lands, all of which are described in the Statement of Agreed Facts (par. VII; R. 49-51).

By this instrument Kettleman agreed to pay the stipulated overriding royalty to Kennedy from the described property, Kennedy having no interest whatever therein except as created by this document.

Exhibit "E". This might be said to be the last and most important operative document, the balance of the exhibits consisting mainly of mesne conveyances. We

shall therefore examine Exhibit "E" in slightly greater detail. It is an operating agreement dated January 6, 1927, between Kennedy and Kettleman Oil Corporation. It recites that whereas Kennedy owns Oil and Gas Prospecting Permit No. Visalia 09551 covering the 2556.58 acres (described in Exhibit "B"); and whereas he desired the exploitation of the property for oil and gas; and whereas Kettleman is financially able to do so, it is therefore agreed:

1. Kettleman is given the *exclusive* right to enter upon and to occupy the described land for the purpose of prospecting, drilling for, developing, producing, marketing and refining all oil, gas, casinghead gasoline, and other hydrocarbon substances;

2. Kettleman agrees to keep and perform all drilling obligations pursuant to the permit and all extensions thereof;

3. If oil and gas is discovered on the property Kennedy agreed to apply for a lease covering the property and to select as the acreage to be included in the 5% Government royalty area all of Section 28, Township 21 South, Range 17 East, M.D.B.&M., and he further agreed to assign any lease issued to him to Kettleman, subject to the approval of the Department of the Interior;

4. Kettleman agreed to pay to Kennedy the same royalties as specified in Exhibit "B" (the lands here are the same as those described in Exhibit "B");

5. Kennedy agreed without additional consideration at any time and on the request of Kettleman to

deliver to such persons as Kettleman should designate an instrument sufficient to assign to Kettleman, or its successors or assigns, all of Kennedy's interest in the permit, subject to the reservation of the above royalties; and

6. Kennedy represented that he had granted no undisclosed or adverse titles to the oil and gas on this property.

This document discloses that as to the Kennedy lease lands, Kennedy had only a right to enter and prospect under the United States Prospecting Permit; that he granted *all* right he had thereunder to Kettleman; that Kettleman's only obligations under the instrument were to comply with the terms of the permit and any extension thereof, and any lease which might thereafter be issued, and in the event of the discovery of oil and gas, to pay the stipulated royalties to Kennedy.

Exhibits "F" through "U" inclusive. Exhibits "F" through "U" inclusive are various mesne assignments and conveyances whereby the rights and obligations created by the foregoing Exhibits "A" through "E" inclusive, eventually came to be held and assumed by appellant herein. It would not aid in the determination of this appeal to trace at length these various assignments. It is agreed in the Statement of Agreed Facts (par. VIII; R. 51) that appellant succeeded to and assumed all the rights, liabilities and obligations of its predecessors in interest, Kettleman Oil Corporation, Pacific Western Oil Company, and Kettleman and Inglewood Corporation, in the lands affected by the foregoing exhibits.

Exhibits "V" and "W". Exhibit "V" is United States Oil and Gas Lease No. Sacramento 019438(c); Exhibit "W" is United States Oil and Gas Lease No. Sacramento 019438(d). These leases cover the lands described therein which are a portion of what we have referred to as the Kennedy lease lands.

Exhibit "X". Exhibit "X" is the Kettleman North Dome Unit Agreement. We shall not analyze this, and, in fact, do not understand what pertinency it has to any of the questions presented on this appeal.

Exhibit "Y". These are the articles of incorporation and by-laws of the Kettleman North Dome Association. The foregoing comment applies to this exhibit.

Exhibits "Z" and "AA". These exhibits were royalty owners' consents and agreements whereby Kennedy consented to Honolulu's predecessors in interest becoming members of the Kettleman North Dome Association with respect to all the property involved in this litigation except the south half of the southwest quarter of Section 22, Township 21 South, Range 17 East, M.D.B.&M. (see Statement of Agreed Facts, par. XII; R. 54).

Exhibit "BB". This is an agreement between Kennedy and Honolulu's predecessors in interest dated January 1, 1940, with reference to tolling the statute of limitations on any of Kennedy's claims pending the determination of the action brought by the United States of America against the General Petroleum Corporation. This is the action referred to in the affidavit

of Herbert W. Clark (R. 60). This agreement does not affect the questions upon this appeal since it did not purport to affect any rights which might have theretofore become statute barred.

Exhibit "CC". This is an undated copy of a document entitled "Assumption of Obligations" whereby Honolulu, among others, assumed the rights and obligations of its predecessors in interest (as has been already stipulated).

Exhibit "DD". This is a tabulation showing the additional amount of royalties to which appellees would be entitled, on their theory of the case, for the period from July 1, 1931 to August 29, 1935.

Exhibit "EE". This is a monthly statement submitted by Pacific Western Oil Company to Frank Kennedy covering the month of August 1934; it is an exemplar of the monthly statements submitted to and received by Kennedy during the period of time in question.

Exhibits "FF" and "GG". These are letters explaining why no allocation of royalties was ever due to Kennedy on account of the south half of the southwest quarter of Section 22, Township 21 South, Range 17 East, M.D.B.&M.

Exhibit "HH" (contained in addendum to the Statement of Agreed Facts). This is an exemplar of identical form letters sent during the period of time in question by Kennedy to Honolulu's predecessors in interest upon receipt by him of his monthly royalty

checks accompanied by the statement in the form of Exhibit "EE".

B. The Legal Effect of the Exhibits.

1. Did any or all of the various documents create a joint adventure between the parties?

Without again reviewing the exhibits, it is perfectly obvious that they are nothing more than the usual every-day assignments, leases and operating agreements in common use in the oil and gas industry. The legal effect of these documents must be judged by the applicable principles of law and not by any characterization found in appellee's complaint of these agreements, leases and other documents as constituting agreements of "cotenancy" or "coadventure".

Appellees speak of a "coadventure" as having existed between the parties, which must mean a joint adventure, since the terms in law are interchangeable. It is clear that none of the exhibits created a joint adventure between the parties because none of the essential elements of a joint adventure were present in any of them. These elements are clearly defined in the case of *Beck v. Cagle*, 46 C.A.2d 152, 115 P.2d 613 (1941) to be as follows: (a) a community of interest in the object of the undertaking; (b) an equal right to direct and govern the conduct of the other parties to the adventure with respect thereto; (c) a share in the profits and in the losses, if any; and (d) a close or even fiduciary relationship between the parties.

At least two elements are always necessary to constitute a joint adventure, and these are, a community of interest and a sharing of profits and losses.

Quinn v. Recreation Park Association, 3 Cal.2d 725, 46 P.2d 144 (1935);

Heebner v. Senderman, 85 Cal. App. 196, 259 Pac. 106 (1927);

Howard v. Societa, etc., 62 C.A.2d 842, 145 P.2d 635 (1944).

A joint adventure or "coadventure" is often stated to be nothing more than a partnership undertaken by two or more persons jointly to carry out a single business enterprise for profit; in effect, a partnership for a single transaction.

Hansen v. Burford, 212 Cal. 100, 297 Pac. 908 (1931).

It is stated in the often cited case of *Motion Picture Enterprises v. Pantages,* 91 Cal. App. 677, 267 Pac. 550 (1928) at page 682:

> "* * * in order to bring a contract within the legal designation of a copartnership or a joint enterprise, it must appear that the parties thereto are associated together for the joint benefit of all; that they are joint owners of the property belonging to the association and share jointly in the profits as well as in the same proportion bear the losses that might result from the enterprise."

Testing the exhibits by these rules, it is clear that none of the documents created a joint adventure between the parties, since Kennedy would not share in any profits or losses of the operating companies. Simi-

larly, those companies would not share in any profits or losses of Kennedy. The operating companies agreed to pay Kennedy certain royalties in the event of the discovery of oil and gas. Kennedy had no right to direct or control the activities of the operating companies in regard to the operation of the properties, their rights of occupation and operation being exclusively in them. The companies had *all* the operating rights and Kennedy had a right to be paid royalties. There was no community of interest in the object of the undertaking or in the property involved.

Even if Kennedy and the operating companies had been co-owners of the lease, this would not of itself have created a joint adventure between them. In *Bowmaster v. Carroll*, 23 Fed.2d 825 (C.C.A. 8, 1928), several parties entered into an agreement to purchase an oil and gas lease. Each was to own an undivided one-fourth interest therein. The Court held, at page 827, that although they were joint owners of the lease this fact did not

> "* * * without more, establish between them the relation of joint adventurers * * *. Appellants failed to establish the existence of a combination between them * * * for the purpose of jointly making a profit at or prior to the time Walter Carroll acquired the assignment of the oil and gas lease."

The uniform rule in California, as stated in the case of *Spier v. Lang*, 4 Cal.2d 711, 53 P.2d 138 (1935), is that even though it be shown that there was to be a division of the profits of an enterprise this of itself does not establish a joint adventure. In the *Spier* case

the Court was considering whether a drilling contract created a joint adventure. Various persons had advanced money to enable the defendant to drill oil wells, and they were to receive certain percentages of the production therefrom after being reimbursed the money they had advanced. One question at the trial was whether a partnership or joint adventure existed between the parties. The trial court found that no joint adventure existed and, on appeal, plaintiff claimed that the fact that there was to be a division of the profits necessitated the finding that there was a joint adventure. The Supreme Court of California, however, in affirming the decision of the trial court, stated, speaking of the element of division of profits (p. 716):

> "But this feature of the agreement has long been held not to require a conclusion that a partnership relation existed where also there was no joint participation in the management and control of the business, * * * the presence of the same element is necessary to constitute the parties joint adventurers."

To the same effect:

Neet v. Holmes, 25 Cal.2d 447, 154 P.2d 854 (1944);

Stoddard v. Goldenberg, 48 C.A.2d 319, 119 P.2d 800 (1941);

Enos v. Picacho Gold Mining Company, 56 C.A. 2d 765, 133 P. 2d 663 (1943).

A case from New York contains a particularly apt statement of the reason why the appellees have

endeavored to characterize the exhibits as agreements of "coadventure". In *Weisner v. Benenson*, 89 N.Y.S. 2d 331, 275 App.Div. 324 (1949), the court was considering whether an agreement for the acquisition of property constituted a joint adventure, and the point was determinative of the case because the agreement was oral and otherwise unenforceable under the statute of frauds unless a joint adventure existed. The Court said at page 332:

> "This legal distinction for many years has caused parties desiring to enforce oral contracts for the conveyance of land to endeavor to spell out joint ventures or partnerships, in order to escape the bar of the statute of frauds. The evidence in litigations of this kind should be scrutinized in order to determine whether the facts warrant a conclusion that a joint venture or partnership was formed."

The remarks of the court in this case apply equally well to the bar of the statute of limitations.

Appellant Honolulu submits that none of the exhibits, whether taken separately or in their entirety, created any relationship of joint adventure between the parties, since:

(a) there was no community of interest in the object of the undertaking; the operating companies had all the operating rights and the rights to possession and Kennedy had a contract right to be paid royalties; neither party had an interest in anything that the other party had an interest in;

(b) there was no equal right to direct or govern the conduct of the other parties; and

(c) there was no sharing of profits or losses; Kennedy would have asserted this fact if the operating companies had drilled a dry well and then requested Kennedy to contribute toward the losses.

Tested by every rule adhered to by the California courts, neither all nor any of the pertinent documents established the relationship of joint adventurers or "coadventurers" between the parties.

No fiduciary relationship between the parties could have arisen out of their status as joint adventurers because that status did not exist.

2. Did any of or all the various documents create a relationship of cotenancy between the parties?

Persons may be co-owners of property without being engaged in a joint adventure. It is therefore necessary to determine whether Kennedy and the operating companies were "cotenants" of any property, since appellees allege in their complaint that a fiduciary relationship arose because the parties were cotenants of something. In this connection we must deal separately with two categories of property involved in this litigation—first, the Kennedy fee land and second, the Kennedy lease lands.

First, as to the Kennedy fee land—Kennedy owned the land and all minerals therein in fee. By Exhibit "A" he *granted* this property to Kettleman Oil Corporation and *reserved* to himself a portion of the oil and gas estate. It is possible that Kennedy and Kettleman, as to the Kennedy fee land, were therefore

cotenants of the mineral estate, for the reason that all said mineral estate was originally owned by Kennedy; he conveyed a part of it and reserved a part of it, thus making his grantee and himself co-owners of the mineral estate. See, for example, *Little v. Mountain View Dairies,* 35 Cal.2d 232, 217 P.2d 416 (1950). This fact, however, is without legal significance since it is agreed in the Statement of Agreed Facts (par. XII; R. 54) that no production from or allocable to the Kennedy fee land is involved in this litigation. If Kennedy and Kettleman (and Kettleman's successors in interest) were cotenants of the oil and gas estate in the Kennedy fee land, that fact is without significance since this litigation does not involve any recovery in relation to such lands. The relationship of Kennedy and Kettleman, as to the Kennedy fee land, is therefore out of this case.

It is only from what we call the Kennedy lease lands that there was any production involved in this litigation. The crucial question therefore, on this phase of the matter, is whether any cotenancy existed between the parties as to the Kennedy lease lands?

Appellant points out that before the execution of the documents affecting the lease lands (Exhibits B, C, D and E) all that Kennedy had in regard to these lands was a United States Oil and Gas Prospecting Permit, which gave him the right to go upon the lands and prospect for oil and gas. Under any subsequent leases he would have no greater right, *i.e.,* he was simply to be a lessee of the United States, since the United States and not Kennedy owned this land. It

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is pertinent, therefore, to consider just what interest Kennedy conveyed by the execution of the documents referred to as Exhibits "B", "C", "D" and "E".

Kennedy did not by these documents reserve to himself (as in the case of the fee land) a portion of the oil and gas estate, *because he granted to the operating companies all his rights of entry and possession.* These documents demonstrate that not only did Kennedy assign everything he had to the operating companies, but that he was specifically excluded by these instruments from any rights of entry, operation or production thereunder. The operating companies in return promised to pay to Kennedy a royalty equal in amount to certain percentages of any oil or gas produced. Under this set of facts, of what *estate* could Kennedy and the operating companies have been cotenants? The Supreme Court of California answered this question in the landmark case of *La Laguna Ranch Co. v. Dodge,* 18 Cal.2d 132, 114 P.2d 351 (1941). The Court in this case settled once and for all that the only thing that an oil and gas lessee (this is all that Kennedy was) has in the way of an interest in the leased lands is a *profit a prendre,* that is, the right to go upon the property to remove a part of the substance of the land. When Kennedy assigned his oil and gas prospecting permits and other interests of a leasehold nature to the operating companies, he assigned away his entire *profit a prendre,* and there was nothing left in him of which he and the operating companies could be cotenants. As simply stated in the *La Laguna* case at page 138 of 18 Cal.2d:

"Similarly, while the operating lessee may assign an interest in his *profit a prendre* which is intended to make the assignee a tenant in common of his entire leasehold estate, he may, on the other hand, intend to retain in himself the operating rights contained in the *profit a prendre*, conveying to the assignee merely a fractional share of the oil and gas produced in the form of an overriding royalty. (See *Schiffman v. Richfield Oil Co., supra*, pp. 224, 225.) Thus, in so far as *Payne v. Callahan, supra*, holds that the fractional interests created either by the lessor or the operating lessee constitute a tenancy in common in a *profit a prendre* as a matter of law, it is expressly disapproved. In any case, the intention of the parties is controlling, and in the absence of a clear indication that such was the intent, the court will not construe royalty interests created for the duration of a specific oil and gas lease as granting the right to enter upon the land in question for the purpose of carrying on oil production or as creating a tenancy in common in the *profit a prendre* for that purpose. The instrument creating the overriding royalty interests of the defendants herein evidences no intent that defendants were to become tenants in common of the lessees' *profit a prendre*. The instrument recites the fact that the operating lessees were required to commence the drilling of an oil well and indicates that the defendants' only function was that of furnishing capital for this purpose. All actual operation was left in the hands of the lessees and it is clear that the parties contemplated no right of entry in the defendants for the purpose of drilling for oil and gas. It follows that no tenancy in common was

> created in the *profit a prendre* of the operating lessees."

The *La Laguna* case was followed with approval in *Chase v. Trimble,* 69 C.A.2d 44, 158 P.2d 249 (1945), where the Court expressly held that there could be no cotenancy between the holder of an overriding royalty interest and the operating lessee where the operating lessee had the entire *profit a prendre,* that is, where he had the sole and exclusive rights of entry, exploration and production. See also:

Dabney-Johnston Oil Corp. v. Walden, 4 Cal. 2d 637, 52 P.2d 237 (1935);

Austin v. Hallmark Oil Co., 21 Cal.2d 718, 134 P.2d 777 (1943).

The basic test of cotenancy is whether *unity of possession* exists. As stated in *Dabney-Johnston Oil Corp. v. Walden,* 4 Cal.2d 637, 52 P.2d 237 (1935), at page 655:

> "A tenancy in common is characterized by a single unity, that of possession, or of the right to possession."

Applying this test, was there any unity of possession between Kennedy and the operating companies of the rights existing under the pertinent documents, that is to say, the *profit a prendre?* Certainly not, because in and by those various instruments Kennedy conveyed away his entire right of exploration, entry upon and production of oil and gas, and he did not retain in himself any right in conjunction with the operating lessees to go upon the land for these purposes. Hence,

there was not and could not have been the necessary unity of possession to constitute Kennedy and the operating companies cotenants of the only estate there was, that is, the *profit a prendre*.

As we have shown, the Kennedy fee land must be put aside as having no relevancy whatsoever to the determination of the questions on this appeal. As to what we call the Kennedy lease lands, the only source of any cotenancy relationship between the parties must be in all or some of the exhibits. If these documents do not as a matter of law create such relationship, there is no foundation for any determination in the judgment that a fiduciary relationship of cotenancy existed, which prevented the statute of limitations from running. Appellant Honolulu submits that on this phase of the case, the law is conclusive that the documents created no such relationship.

3. **Did any other relationship of a fiduciary nature, or of trust and confidence, exist between the parties by virtue of the pertinent agreements?**

Since no relationship of joint adventure or cotenancy existed between Kennedy and the operating companies, appellees' claim must finally rest upon the assertion that some vague and undefined sort of fiduciary relationship existed between the parties simply because of the execution by them of the various documents in question.

Absent a true joint adventure and absent a true cotenancy, this is the only remaining support for the judgment. Just how lacking in seriousness this assertion is, will be evident, because such position means

that every ordinary oil and gas lease, assignment, or operating agreement somehow transmutes a contractual relationship between the parties into a fiduciary relationship.

There are, of course, many situations involving oil and gas leases, assignments and other agreements in which one of the parties may stand in a fiduciary relation to another, but an examination of the cases involving such situation will disclose that the fiduciary duty, in each instance, has arisen by reason of facts and circumstances extraneous to the instruments themselves, and which would impose a fiduciary duty in any circumstance. It certainly cannot be said that the ordinary every-day oil and gas lease, assignment or reservation of royalties, creates a fiduciary relationship rather than a contractual one.

The decision of the Court below is actually predicated upon the opinion of Judge Harris in the *Seaboard* case (99 Fed. Supp. 730). It is Honolulu's position that such opinion, *when applied only to the exhibits in this case and not to any extraneous facts—and there are no extraneous facts in this case—is clearly erroneous.*

Judge Harris' opinion (99 Fed.Supp. at page 732) quotes from *Summers on Oil and Gas,* Vol. 3, commencing at page 321, to the effect that where the assignment of a lease expressly provides that the reservation of an overriding royalty shall apply to extensions, renewals or modifications of the lease, this creates a relation of trust and confidence between the assignor and his assignees. Examination of this

quotation, however, demonstrates that it does not support the conclusion that the assignment of an oil and gas lease with the reservation of an overriding royalty ordinarily creates a fiduciary relationship between the parties. The cases cited by Summers for this proposition are cases which hold that the assignees of a lease, who take it with the knowledge of the fact that their assignor was obligated to pay an overriding royalty, are in the position of trustees for the overriding royalty holder where they obtain a *renewal* of the original lease from the lessor; in other words, it is obvious that the lessee, by the device of obtaining a renewal lease, cannot escape the obligation to pay the overriding royalty. In such a situation, there being no contractual remedy between the parties, the court will impose a fiduciary duty upon the lessee, who has attempted by obtaining a renewal, to defraud the royalty owner. Obviously, this line of cases has no application to the case at bar.

Judge Harris in his opinion did not cite the preceding language from *Summer on Oil and Gas,* Vol. 3, Section 554, at page 320, where Summers states:

> "While the right to overriding royalty, or a sum of money paid out of production of oil or gas, created in the assignment, does not survive the termination of the assigned lease, yet in a number of cases the assignor has claimed that the assignee, by permitting the lease to expire, or by surrender thereof, and the taking of a second lease from the lessor, has violated a relation of trust and confidence, and that the assignor should be entitled to such overriding royalty or money out of production under the renewal lease. *The mere as-*

signment of an oil and gas lease creates no such fiduciary relation. If it is created, it must be by the terms of the assignment." (Emphasis supplied.)

The above comments apply to the cases cited in Judge Harris' opinion at page 733 of 99 Fed.Supp., such as *Oldland v. Gray,* 179 F.2d 408 (C.A.10, 1950). There the assignee of a lease, who had knowledge of the existence of an overriding royalty, attempted to eliminate the royalty by obtaining a renewal of the lease from the United States after the expiration of the original lease. The plaintiff royalty owner had no contractual remedy, but the Court imposed a fiduciary duty upon the lessee whose inequitable conduct would otherwise have led to his unjust enrichment. This is obviously not the case at bar. It is interesting to note that in the *Oldland* case, the Court found that the parties were not tenants in common, mining partners, nor joint adventurers, by reason of their relationship.

In the instant case appellees always had their contractual remedy against appellant Honolulu and its predecessors in interest. No reasons exist for the Court imposing a constructive trust or finding that any fiduciary duty exists. If the decision of Judge Harris is taken to mean that, absent any extraneous circumstances, a fiduciary relationship arises out of and is created by nothing more than the documents which are exhibits in this case, then such opinion is simply erroneous.

The reservation of an overriding royalty, the execution of an oil and gas lease, or the assignment thereof,

does not in and of itself create any joint adventure, cotenancy, or any sort of fiduciary relationship between the parties.

McDonald v. Follett, 142 Tex. 616, 180 S.W.2d 334 (1944);

Julian Petroleum Corp. v. Courtney Petroleum Corp., 22 Fed.2d 360 (C.C.A.9, 1927);

Gordon v. Empire Gas and Fuel Co., 63 Fed.2d 487 (C.C.A.5, 1933);

Henry v. Gulf Refining Co., 179 Ark. 138, 15 S.W.2d 979 (1929);

Shropshire v. Hammond, 120 S.W.2d 282 (Tex. Civ.App. 1938);

Robinson v. Eagle-Picher Lead Co., 132 Kans. 860, 297 Pac. 697 (1931);

Phillips Petroleum Co. v. Johnson, 155 Fed.2d 185 (C.C.A.5, 1946), cert. den. 329 U.S. 730 (1946);

Phillips Petroleum Co. v. Bynum, 155 Fed.2d 196 (C.C.A.5, 1946);

O'Donnell v. Snowden & McSweeny, 318 Ill. 374, 149 N.E. 253 (1925);

Summers on Oil and Gas, Vol. 3, Sec. 554, p. 320;

75 *A.L.R.* 847.

As the Court stated in *Bunger v. Rogers,* 188 Okla. 620, 112 P.2d 361 (1941) at page 363 (of 112 P.2d):

"The defendants were merely lessees under an oil and gas mining lease and were under no obligation to the plaintiff, other than to pay the rent and royalty provided in said lease, and if they

> breached this duty then their liability was purely a contractual one and in no sense fiduciary."

And as stated in *Phillips Petroleum Co. v. Bynum,* 155 Fed.2d 196 (C.C.A.5, 1946), at page 199, involving the payment of a royalty:

> "We have searched for some principle of law that would permit us to announce that when the defendant takes all the gas from the well and makes such disposition of it as best suits its purpose under a contract which does not state a definite sum to be paid for such gas, there arose either a fiduciary relation or a relation as principal and agent which would place the lessee under the duty to keep his principal fully informed and to disclose all facts that came to his knowledge and to fully and faithfully account to the lessor."

The Court concluded that there was no principle of law which established any such fiduciary relationship.

The principle is very clearly stated in *O'Donnell v. Snowden & McSweeny,* 318 Ill. 374, 149 N.E. 253 (1925), where the Supreme Court of Illinois said at page 255 (of 149 N.E.), speaking of an agreement to pay royalties:

> "Much of appellants' brief is devoted to an argument based on the assumption that a fiduciary relation existed between the parties to the supplemental agreement of 1914 and that appellee overreached appellants in making the agreement. There is no relation of special trust or confidence between the lessor and lessee in a gas or oil lease any more than in any other. Colgan v. Forest Oil Co., 194 Pa. 234, 45 A. 119, 75 Am. St. Rep.

695. Like all other contracting parties, they deal at arm's length, each for his own interest. The mere act of making the contract does not constitute proof of a fiduciary relation. Bordner v. Kelso, 293 Ill. 175, 127 N.E. 337."

Appellant Honolulu has shown that no joint adventure in fact existed between the parties; that no cotenancy in fact existed or could have existed between the parties; and, hence, no fiduciary relationship arising from one or both of these relationships came into being.

Lastly, no general fiduciary relationship exists between parties to oil and gas leases, assignments and reservations of royalty, such as we have here, merely by reason of their contractual relationship. There are no special facts in the case at bar which would move a court to impose a fiduciary duty. The only evidence in this case—the exhibits—does not create any such relationship.

The judgment appealed from is erroneous for the reason that its principle would convert every contractual relationship of whatsoever kind into a fiduciary relationship. The only obligation of the appellant and its predecessors in interest in the instant case was to *pay* an overriding royalty; and the appellant and its predecessors in interest always recognized this obligation and never attempted to defeat it by any inequitable conduct which would call for the imposition of a trust. Unless, therefore, every debtor is to be converted into a trustee for his creditors, the decision of the Court below should not stand.

POINT THREE.

APPELLEES CANNOT AVOID THE STATUTE OF LIMITATIONS BY ATTEMPTING TO CONVERT THEIR ACTION INTO ONE FOR EQUITABLE RELIEF.

Every asserted right of appellees arises out of and by virtue of various exhibits already discussed, all of which are nothing more than written contracts between the parties. As we have shown, these contracts do not in and of themselves create any sort of fiduciary relationship between the parties.

In this situation, it is settled that a party cannot avoid the bar of the statute of limitations by seeking to convert a simple contract action into an action for equitable relief, by the device of asserting a breach of trust or the existence of some undefined fiduciary relationship. The exact situation in the case at bar obtained in the case of *Fowler v. Associated Oil Co.*, 74 P.2d 727 (Supreme Court, California, 1937). (This case was not reported in the official California reports; the Supreme Court rendered an opinion in the case reported at the citation above given, and rendered a decision in a companion case at 74 P.2d 736. Thereafter, the actions were both dismissed pursuant to stipulation after the Supreme Court had granted a rehearing in one and denied a rehearing in the other case. The reasoning of the Supreme Court is particularly applicable.)

In the *Fowler* case the plaintiffs were owners of royalty interests, who commenced an action against the defendant lessee to impeach, on the ground of fraud, various accountings for royalties made by the defendant to the plaintiffs. It was conceded that the statute

of limitations had long since barred recovery unless some fiduciary relationship or breach of trust was involved. The plaintiff claimed fraud and constructive fraud but the Court held that the statute of limitations barred the asserted cause of action. The trial court had found that the plaintiff royalty owners "had implicit faith in the honesty and integrity of the defendant." The Supreme Court, however, at page 728 of 74 P.2d stated:

> "This is not, however, sufficient to make out a fiduciary relationship. There must be more than mere confidence in another's honesty and integrity to sustain the presumption of constructive fraud."

Speaking of the way in which the complaint was drawn in order to avoid the bar of the statute of limitations, the Court said at page 729:

> "Examination of the complaint wherein plaintiffs disclosed their cause of action indicates that it was one for breach of contract. Throughout the trial of the action plaintiffs consistently maintained that they were entitled under the lease to be paid for their royalty oil the prevailing market price of clean or dehydrated oil and the defendant by the employment of erroneous and incorrect methods of sampling and testing had not fulfilled its contract obligations. True, they claimed that defendant had defrauded them and sought to impeach the monthly accountings which defendants had rendered on the ground that defendant had acted fraudulently and in bad faith in making such accountings. The charge of fraud was, however, incidental to the real purpose and object of the suit which was to recover for breach of contract."

Thus, it is not permitted for a plaintiff to circumvent a statute of limitations in what is essentially a suit for a breach of contract, by the device of drawing his complaint in the form of a suit for an accounting, for breach of trust, or by the device of alleging the existence of a fiduciary relationship when none in fact exists.

Bendien v. Solov, 89 C.A.2d 904, 202 P.2d 372 (1948);

Parker v. Shell Oil Co., 55 C.A.2d 48, 130 P.2d 158 (1942).

Exhibit "EE" is a specimen of the monthly accounting statements sent to Frank Kennedy by appellant's predecessors in interest, which reflected the royalty due him each month from all the lands and leases herein involved. It is settled law in California that each of these monthly statements became an account rendered at the time it was received by Kennedy, regardless of any objection that he might have had thereto, so that the statute of limitations commenced to run each month as to each such statement and account.

Rehbock v. Reservoir Hill Gas Co., 14 C.A.2d 233, 57 P.2d 1357 (1936).

Whether the appellees' cause of action be framed, as it should have been, for a simple breach of contract, or whether it be cast in the form of an action for an accounting, the 4-year statute of limitations of the State of California (either Section 337 or Section 343 of the California Code of Civil Procedure) commenced

to run and barred any recovery by the appellees four years after the rendition of each monthly statement.

Alamitos Land Co. v. The Texas Company, 11 C.A.2d 614, 54 P.2d 489 (1936);

West v. Russell, 74 Cal. 544, 16 Pac. 392 (1888).

As stated in the *Alamitos* case at page 618 of 11 C.A.2d:

> "If doubt be entertained as to the form of the monthly statements prior to August, 1928, whether or not they constituted accounts stated, or if question be raised as to the interpretation of the letter contract in effect at that time—whether it amounted to a contract of sale or bailment—the points become immaterial because recovery for that period would in any event be barred by the statute of limitations, being for a period more than four years antedating the commencement of the within action."

CONCLUSION.

The case before this Court is simple, despite the length of the complaint and the number of exhibits. The uncontradicted facts are: That appellant Honolulu and its predecessors in interest were operating oil and gas companies which had agreed to pay Frank Kennedy royalties on account of interests which he held in oil and gas bearing properties when he assigned those interests to these operating companies.

The appellant Honolulu and its predecessors accounted each month to Kennedy for his monthly

royalties on the basis of the prices which Honolulu and its predecessors themselves received from other oil companies for the oil which they produced and sold; Honolulu and its predecessors had no control over, nor voice in, the fixing of such prices.

The appellees claim that although Honolulu and its predecessors in interest accounted to Kennedy on the basis of the prices they received, they are nevertheless entitled to more because during the period of time in question an artificially depressed price (in which appellant had no hand) existed in the oil producing areas in question. No particular relationship existed between Kennedy and these companies except in so far as it might have been created by the various documents attached as exhibits. None of these documents created the relationship of joint adventure between Kennedy and the operating companies, nor did they make these parties cotenants in any sense of the word. Appellees nevertheless claim that some general fiduciary relationship was created by one or more of these documents and that for this reason the applicable statute of limitations never barred their claim.

What is a fiduciary? Professor Austin W. Scott defines a fiduciary as "a person who undertakes to act in the interest of another person." (*California Law Review,* Vol. 37, p. 540). It nowhere appears in this case that Honolulu or any of its predecessors in interest ever "undertook to act in the interest of" Frank Kennedy or any of the appellees herein. On the contrary, it clearly appears by the exhibits herein referred to that all dealings between the parties were

at arm's length, and were no more than the usual and every-day leases, assignments and other agreements in use in the oil and gas industry. These documents were executed by parties who were each acting in their own interest and who understood that fact at the time such documents were executed.

The decision of the Court below is incorrect in principle and must be reversed since, if it is allowed to stand, it would transmute every simple contractual relationship into a fiduciary duty and nullify the statute of limitations. For this reason, appellant Honolulu respectfully submits that the decision of the Court below should be reversed.

Dated, San Francisco, California,
June 11, 1956.

Respectfully submitted,
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No. 15,049

In the

United States Court of Appeals

For the Ninth Circuit

HONOLULU OIL CORPORATION,
a corporation,
Appellant,

vs.

KATHARINE H. KENNEDY and MARK C. ELWORTHY, Executors of the Will of Frank Kennedy, Deceased,
Appellees.

Appellees' Brief

Appeal from the District Court of the United States
for the Northern District of California,
Southern Division.

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SUBJECT INDEX

Pages

TEXTS

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Appeal from the District Court of the United States
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On January 6, 1927, Frank Kennedy, then the owner of a U. S. Oil and Gas Prospecting Permit and fee land in the Kettleman Hills area, executed four documents with Kettleman Oil Corporation (appellant's predecessor) looking to the exploitation and development of Kennedy's properties. By these documents, upon which we later comment in more detail, Kennedy transferred to Kettleman Oil Corporation the greater portion of his interest in the permit and fee land, reserving for himself a percentage royalty interest or share "running with the land," and taking from Kettleman an

operating agreement for the development of the lands and additional royalties on other properties.

The sole issue presented upon this appeal is whether, from such documents, the trial court was justified in finding that a fiduciary relationship existed between Kennedy and Kettleman Oil Corporation, so as to bar the running of the statute of limitations upon the collection, by Kennedy, of additional royalties concededly due him for the period commencing July 1, 1931, and ending August 29, 1935. It was stipulated between the parties that, if the statute of limitations did not run, appellees were entitled to such additional royalties in the amount of $9,519.11—and the trial court so held.

Appellant would apparently have the Court believe that, since the present action was not commenced until 1950, appellees were sleeping on their rights for fifteen years following the close of the period for which such additional royalties are owing. Such, however, is not the case. In 1940, Frank Kennedy and appellant's predecessor entered into a waiver (Exhibit BB to Statement of Agreed Facts), which tolled the statute of limitations until the final determination of the case of *United States of America v. General Petroleum Corporation of California, et al.,* 73 Fed. Supp. 225 (1946), then pending in the United States District Court. This action was not finally determined until October 16, 1950, when the trial court's decision was affirmed upon appeal to the Ninth Circuit, *sub nom Continental Oil Co. v. United States,* 184 Fed. 2d 802, (C.C.A. 9).

The present action was promptly filed upon the final determination of such case, and within the provisions of the waiver; and the agreed computation of additional royalties due appellees in this case was, concededly, based upon the decision in the *General Petroleum* case.

1. WHETHER A FIDUCIARY DUTY EXISTS BETWEEN THE PARTIES WAS A QUESTION OF FACT TO BE DETERMINED BY THE TRIAL COURT UPON THE STIPULATED EVIDENCE; AND THIS COURT SHOULD NOT DISTURB THE CONCLUSION OF THE TRIAL COURT UPON SUCH QUESTION OF FACT.

Whether or not a fiduciary duty exists between the parties is, as the case of *La Laguna Ranch Co. v. Dodge,* 18 Cal. 2d 132, 114 Pac. 2d 351 (1941), cited by appellant, shows, a question of fact to be determined from the documents defining the respective interests of the parties.

The documents defining appellees' interests here (i.e., the documents executed by Frank Kennedy and Kettleman Oil Corporation) have already been, as appellant's brief points out, three times construed by the United States District Court—and it has, each time, been determined that, upon the facts, it is clear that a fiduciary duty exists between the parties.

The first two of these determinations were made, as appellant's brief points out, in the case of *Kennedy v. Seaboard Oil Company,* (United States District Court, Northern District of California, Southern Division, Civil Action No. 22469-R), in which case the court was concerned with the construction of the same identical documents executed by Kennedy and the Kettleman Oil Corporation—since the Seaboard Oil Company, like appellant here, succeeded to a portion of the Kettleman Oil Corporation's interests.

In the *Seaboard* case, the question was first presented upon motion to dismiss, and Judge Harris, in a well reasoned decision, held that, upon the documents and facts themselves, a fiduciary relationship exists.

Kennedy v. Seaboard Oil Company, 99 Fed. Supp. 730 (1951).

The *Seaboard* case later came to trial, upon cross motions for summary judgment and a Statement of Agreed Facts similar to that in this case, and Judge Goodman, in deciding in favor of appellees (Kennedy), held that he did so both for reasons of comity (with Judge Harris' decision) and:

> "* * * also because, *upon the evidence agreed to by the parties in the Statement of Agreed Facts* and the matters admitted by the pleadings, I concur in the reasons given by him, I hold that the cause is not barred by the Statute of Limitations." (Order for Judgment, p. 2) (Emphasis ours.)

When, therefore, this case came to trial before Judge Carter, he had before him the decisions of Judge Harris and Judge Goodman, each holding that, upon the facts, the pertinent documents showed a fiduciary relationship so that the statute of limitations did not run. Judge Carter, accordingly, in making his decision in this case, on cross-motions for summary judgment and the Statement of Agreed Facts, stated that, for reasons of comity, he would similarly hold that the statute of limitations had not run. This was necessarily a square determination by Judge Carter of the single issue here involved—whether, as a matter of fact, the pertinent documents showed a fiduciary relationship between the parties.

It becomes readily apparent, therefore, that all the appellant seeks of this Court, and indeed all it could hope to achieve here, is a fourth determination upon the same essential facts. We submit that this case presents a most compelling situation in which to invoke the general rule that an appellate court will not disturb the findings of fact of the trial court—particularly where, as here, to find differently would be to find inconsistently with another final judgment upon the same essential facts.

2. THE DECISION OF THE TRIAL COURT IS AMPLY SUPPORTED BY THE FACTS TO WHICH THE PARTIES HAVE AGREED, AND BY THE APPLICABLE LAW.

But even were it not the general rule that this Court should recognize the determinations of fact by the trial court in this case, it is abundantly clear that the judgment of the trial court is amply supported, both in fact and in law.

It is true, as appellant has pointed out, that the relationship between the parties must be determined from the documents themselves, and not from anything extraneous to them. This does not mean, however, that, in the determination of the fiduciary relationship, appellant may look only to one document, out of the four documents, without relation to any of the others—for the intent of the parties is obviously to be determined by a consideration of all of the four documents, executed at the same time, together.

As we have noted, Exhibits A, B, C, and E to the Statement of Agreed Facts were executed on the same day, January 6, 1927, by Frank Kennedy and Kettleman Oil Corporation (appellant's predecessor). On this day, then, Frank Kennedy:

> (1) conveyed to Kettleman Oil Corporation a quarter section of land in what is now known as the North Dome of the Kettleman Hills field, reserving to himself a certain percentage of the oil which should be produced from this land and a percentage of the proceeds of the sale of gasoline and oil which should be produced, manufactured, and sold from the land, *which reservation was specifically provided to be a "covenant running with the land,"* (Exhibit A);
>
> (2) assigned to Kettleman Oil Corporation his interest in a U. S. Oil and Gas Prospecting Permit covering acreage in the Kettleman Hills oil field, reserving

therefrom royalty interests *which were also provided to be "covenants running with the land,"* (Exhibit B);

(3) received from Kettleman Oil Corporation a promise to pay to Kennedy additional royalties from certain lands in the same field in which Kennedy had no prior interest, (Exhibit C)—the amount of which royalties was increased by a supplementary agreement, (Exhibit D), dated December 6, 1928; and

(4) signed an operating agreement with Kettleman Oil Corporation providing for the exploitation by it of the lands included in the U. S. Oil and Gas Prospecting Permit owned by Kennedy (Exhibit E).

Although there are other conveyances and assignments included in the exhibits to the Statement of Agreed Facts, they relate, as appellant has stated, to mesne transactions whereby the rights and obligations created by the foregoing exhibits came to be held and assumed by the present parties; and do not include any lands in addition to those embraced in the four documents originally executed by Kennedy on the same day and from which the relationship between the parties is to be determined.

Looking at the four original documents together, the conclusion is inescapable that the parties entered into an integrated transaction, whereby Frank Kennedy, who owned land in fee and a prospecting permit in the Kettleman Hills area, deeded his land and assigned his permit to an oil company who had the capital to exploit them, receiving for them in exchange, royalty shares in all of the lands in which he so owned an interest; a promise to develop such lands for their mutual benefit; and other royalties from other lands.

a. The four original documents present an integrated plan for the development of the lands embraced therein.

The execution, on a single day, of the four original documents patently implemented an integrated transaction relating to the exploitation and development, for the joint benefit of the parties, of the lands embraced in such documents. Obviously, each of these four original documents was consideration for each of the other four original documents in this overall agreement—and one document may not be isolated for examination, as appellant seeks to do. It is clear, for example, that Kennedy would never have received royalty interests in other lands (Exhibit C) if he had not parted with interests in his lands and permit; and that Kettleman Oil Corporation would not have agreed to perform all of the operating and drilling requirements, permit obligations, etc.

Again, all of the lands covered by the four original documents were situated in a single known oil field, from which fact, in conjunction with the fact of the execution of such documents on a single day, it is evident that the parties intended the most efficient and productive development of all of said lands as a group rather than separately.

Still further evidence of the fact that the parties intended, by the four original documents, to create a single plan, is found in the fact that, in the various mesne conveyances which eventuated in appellant's ownership, the transfers of percentage interests always included both the fee lands and the leased lands obtained by virtue of the prospecting permit together—no severance of leased and fee lands being made.

The only logical conclusion which may be drawn from the foregoing facts is that a single integrated plan for the development of Kennedy's interests was entered into by the

parties; and the trial court obviously so found. It necessarily follows, therefore, that whatever relationship was to be created by the parties applies equally to the entire group of properties and to each of the properties.

Significantly, appellant concedes a fiduciary relationship through a co-tenancy in the fee lands[1]—but seeks to evade the consequences of this concession by arguing that the fee lands must be considered apart from the relationship of the parties with relation to the prospecting permit lands. In view of the obvious integrated nature of the arrangement between Kennedy and Kettleman Oil Corporation, such was simply not the case. If, as appellant concedes, a fiduciary relationship existed between the parties as to part of the lands, then, obviously, it existed between the parties as to all of the lands, when the relationship of the parties as to all of the lands was embraced in the four original documents executed at the same time.

b. The practical facts also show that a fiduciary relationship was created as to each and all of the properties included in the arrangement.

Kennedy entered into his arrangement with Kettleman Oil Corporation because he was financially unable to develop and fructify his mineral resources himself.[2] For their joint benefit, therefore, he conveyed a part thereof to Kettleman Oil Corporation, which could exploit these resources, and he reserved to himself a portion as part of his consideration to have the other party so exploit them. Both financially and practically speaking, Kennedy was completely dependent upon the good faith and high ethical standards of his transferee, for he had neither the means nor the ability to deter-

1. Appellant's brief, p. 36.
2. Exhibit E to Statement of Agreed Facts.

mine the amount of oil to which he was entitled, or the fairness or accuracy of the price to be paid for his share of oil accruing under his agreements.

In good faith, Kennedy covenanted to continue to assist his transferee and its assigns toward their mutual goal by attempting to secure extensions in his name of the Government permit if Kettleman Oil Corporation should so desire; by attempting to secure a lease in his name should oil be discovered; and by assigning such lease to Kettleman Oil Corporation, or its assigns, upon request.

It was also provided that all of Kettleman Oil Corporation's promises and covenants, and all performance due Kennedy, should permanently bind Kettleman Oil Corporation, and its successors in interest, since it was obvious that Kennedy's interests were *covenants running with the land,* and thus imposed indefinitely into the future a fiduciary obligation to observe such covenants with relation to all the lands included in the agreements in which Kennedy had previously held an interest.

c. The prevailing law supports the obvious conclusion of the trial court that a cotenancy and trust relationship existed between the parties.

It is clear that, under the prevailing law, the judgment of the trial court is sound and is supported on each of several different bases.

1. IN CALIFORNIA AN OPERATING LESSEE IS A TRUSTEE FOR THE PAYMENT OF ASSIGNED ROYALTIES.

In *Taylor v. Odell,* 50 Cal. App. 2d 115, 122 Pac. 2d 919 (1942), the defendant Odell was owner of an oil lease which he assigned to an operating company, reserving a 20% royalty. The court held that Odell and the operating lessee

were cotenants in a real property interest, with Odell owning a share of the oil. The actual conflict in that case was whether Odell stood in a fiduciary relationship to plaintiff, to whom he had assigned 0.5% of the oil to be produced under the lease in consideration of the grant of an easement to the operating lessee. The court found that plaintiff was an owner of oil along with Odell and the operating lessee, (i.e., a cotenant), and that, since the parties had followed the custom of Odell paying plaintiff royalty under this arrangement, Odell held plaintiff's oil or proceeds in trust, and was accountable to plaintiff accordingly. The court stated, p. 123:

> "* * * The moneys paid plaintiffs from the sales of the well's production was received as an incident to ownership, the same as rent from any real property. The assignment of the royalty interest in the well of the Two-and-One Oil Company vested in plaintiffs an interest in the oil produced by that company. When the money for production was received by Two-and-One, it was held in trust for plaintiffs if the company had knowledge of defendant's assignment. (Citing cases) * * *
>
> "As long as he held those moneys he was trustee for plaintiffs and was under obligation to account to plaintiffs for the moneys in his custody. Plaintiffs' action for an accounting and to enforce payment thereof is governed by section 343 Code of Civil Procedure; *Hannah v. Canty,* 175 Cal. 763, 768 (167 Pac. 373). The period of limitation began on the date of defendant's repudiation of his trust, April, 1935, less than four years prior to the filing of the action."

Odell's cotenancy relationship with the operating lessee in that case is the same as the Kennedy-Kettleman Oil Corporation relationship with respect to the leased lands, and plaintiff's relationship with Odell corresponds to the Kennedy-Kettleman Oil Corporation relationship as to the

lands from which Kennedy received an override, but in which he had never owned an interest prior to 1927.

Again, in *Heaston & Glimpse v. West American Oil Co.*, 44 Cal. App. 2d 107, 111 Pac. 2d 905 (1941), the defendant oil company assigned a percentage of gross production under its operating lease to plaintiff, which assignment was to terminate when the consideration for the assignment, a loan from plaintiff to defendant, should have been fully repaid. Subsequently, the defendant ceased payment and asserted the statute of limitations as a bar to the plaintiff's suit on the ground that defendant had paid plaintiff royalties only on oil and not on the gas produced, and that, had the gas royalties been paid as they should have been, defendant's indebtedness to plaintiff would have been fully repaid more than four years prior to the commencement of plaintiff's action. The court held that defendant was obligated, as trustee, to pay the plaintiff out of production according to the terms of the assignment. The court observed that the parties agreed that the contractual relationship which they bore to each other was that of principal and agent. It seems clear however, from the facts of the case, that the only reason they thought of themselves as having this relationship was because the defendant lessee had the obligation of paying over to the plaintiff the royalties due him—which was identical with Kettleman Oil Corporation's (appellant's) obligation to Kennedy. The case stands as authority that in California an operating lessee will be held as trustee for the payment of assigned royalties; and, in this respect, the court said (p. 111):

> "* * * In the present case we are satisfied that the agreement constitutes the West American Oil Company a trustee of the funds derived from the sale of the oil and *gas* and respondent was entitled to rely upon the belief that its trustee was faithfully performing its

services under the contract until the contrary appeared. We believe that the assignment and the acceptance of it constituted an express trust and that the statute of limitations did not commence to run until respondent had knowledge of the repudiation of its terms and a violation thereof by the trustee. This doctrine is set forth in the case of *Allsopp v. Joshua Hendy Mach. Wks.,* 5 Cal. App. 228 (90 Pac. 39), where the court said (p. 234):

'But again, there was an express trust created by the transaction between the parties, and the statute of limitations would not begin to run until there was brought home to plaintiff knowledge of the repudiation of the trust or the violation of its terms on the part of defendant * * * The position of the agent is that of a trustee, and claims against him are governed by a rule similar to that controlling trustees.'

"In the case of *San Pedro Lumber Co. v. Reynolds,* 121 Cal. 74 (53 Pac. 410), the court said, at page 91:

'The statute of limitations cannot be successfully invoked. Reynolds was acting in a fiduciary capacity. Such of his acts as resulted in loss to the corporation were concealed breaches of trust. The statute of limitations would not begin to run in his favor, so as to enable him to escape the results of an accounting, until after knowledge by his principal of his derelictions. In this case the accounting was promptly demanded after discovery.'"

The following language from *Differding v. Ballagh,* 121 Cal. App. 1, 8 Pac. 2d 201 (1932), may be applied with equal force to the relationship between Kennedy and Kettleman (appellant):

"Their chances for 'returns' upon their 'investments', assuming that oil existed as was later proven, depended entirely upon the skill, industry, intelligence, honesty, and integrity of the trustees. The trustees had the

money and independent power in the manner of its expenditure in drilling the two oil-wells. The production owners were given no rights by their contracts to even advise on these matters. If these facts did not create a condition in which the elements of trust and confidence between two groups must have existed, it would be hard to imagine one that did." (p. 6)

2. INDEPENDENTLY, A FIDUCIARY RELATIONSHIP EXISTS BECAUSE KENNEDY'S SHARE AND INTEREST ARE SPECIFICALLY PROVIDED TO BE "COVENANTS RUNNING WITH THE LAND."

The significant thing about the four original documents in this case—and the thing which appellant seeks to ignore—is the fact that the share and interests reserved by Frank Kennedy were, in each instance, declared to be "*covenants running with the land*" (Exhibits A and B). It is clear that, under prevailing law, the effect of this provision is to create a fiduciary relationship in perpetuity between the parties, and, for this independent reason, a fiducial relationship exists betwen the parties, so that the statute of limitations cannot run.

McClure v. Colyear, 80 Cal. 378, 380; 22 Pac. 175 (1889);

Heaston & Glimpse v. West American Oil Co., supra, p. 111;

Berniker v. Berniker, 30 Cal. 2d 439, 448; 182 Pac. 2d 557 (1947).

In its discussion of fiduciary relationship, appellant's brief cites many cases for the proposition that, "The reservation of an overriding royalty, the execution of an oil and gas lease, or the assignment thereof does not *in and of itself* create any joint adventure, cotenancy, or any sort of fiduciary relationship between the parties."[1] Almost all of

1. Appellant's brief, p. 44. Emphasis ours.

these cases concern the termination of a lessee's royalty interest at the expiration of the leasehold term by an assignee who secures a renewal lease without preserving his assignor's royalty. That there is no fiduciary relationship in this circumstance—involving what counsel for appellant denominates the "usual, ordinary, everyday assignments, leases, and operating agreements"—is the general state of the law on this point.

But the very question before each of the trial courts, and again now before this Court, is precisely whether the pertinent documents in the case, taken individually and collectively, constitute "usual, everyday" assignments and conveyances, or whether they contain *something more* which imports a fiduciary relationship between the parties. For the law is different where the lease or assignment is subject to a *covenant running with the land,* or includes by its terms all extensions, modifications, and renewals thereof.

In the case of *Robinson v. Eagle-Picher Lead Co.,* 132 Kan. 860, 297 Pac. 697 (1931), cited at page 45 of appellant's brief, and in *Hawkins v. Klein,* 124 Okl. 161, 225 Pac. 570 (1926), lessee sued his assignee for cutting off his royalty where the assignee had taken a new lease in his own name at the expiration of the old lease without providing for a continuation of the lessee's royalty. The holding of each court ruled that the assignee had no fiduciary obligation to secure any benefit for the lessee under the new lease. Both courts recognized that opposite conclusions would be reached if the assignment contained features of perpetuity, as are present in the *Kennedy* case. The court in the *Robinson* case approved the principle that the perpetuity aspect created a fiduciary relationship when it pointed out that the ruling of the *Hawkins* case was correct, and continued:

"Because the following clause was in the original lease a different conclusion was reached in another recent Oklahoma case under very similar circumstances: 'This reservation shall likewise apply as to all modifications, renewals of such lease or extensions that the assignee, his successors or assigns may secure.' *Probst v. Hughes,* 143 Okl. 11, 12, 286 P. 875, 876, 69 A.L.R. 929."

The distinction between the situation argued by appellant —where there is only an "ordinary" lease with a specific term—and that here presented—where there is specific language of perpetuity and a larger continued interest—is succinctly pointed out in *Summers on Oil and Gas,* Vol. 3, Sec. 554, page 320, as follows:

"While the right to overriding royalty, or a sum of money paid out of production of oil or gas, created in the assignment, does not survive the termination of the assigned lease, yet in a number of cases the assignor has claimed that the assignee, by permitting the lease to expire, or by surrender thereof, and the taking of a second lease from the lessor, has violated a relation of trust and confidence, and that the assignor should be entitled to such overriding royalty or money out of production under the renewal lease. The mere assignment of an oil and gas lease creates no such fiduciary relation. If it is created, it must be by the terms of the assignment. In a number of cases the courts have held that the provisions of the assignment did not create a fiduciary relation between the parties so that the assignor would be entitled to the payment of overriding royalties or other sums out of oil or gas produced under a second lease taken by the assignee. *But where the assignment of a lease expressly provided that the reservation of an overriding royalty should apply to extensions, renewals or modifications of the lease that the assignee or his successors might secure, it was held that such provision created a relation of trust and con-*

> *fidence between the assignor and his assignees* permitting the assignor to payment of the overriding royalty reserved in the assignment out of oil or gas produced under the second lease. A similar result was reached relative to an amount payable out of the oil produced as consideration for the assignment, where the assignment required that the assignee give the assignor notice before relinquishing the lease and on request to reassign to the assignor, and the assignee took a new lease, prior to the expiration of the first lease, without giving the required notice." (Emphasis ours.)

Significantly, appellant's brief quotes only the first portion of this statement, and ignores the reference to the law governing the situation here where the appellees' interest—since it is a *covenant running with the land*—applies to "extensions, renewals, or modifications of the lease," and, as a matter of fact, is in perpetuity.

Similarly, in the case of *Oldland v. Gray,* 179 Fed. 2d 409 (C.C.A. 10, 1950), the assignee of a permit to explore and develop Federal land was held to be in fiduciary relationship to his assignor where the assignee covenanted to perform all the obligations of the permit or any extensions or renewals thereof. Though declining to pin a legal label on the relation, the court described it as "fiducial" and held that it bound remote sub-assignees to honor the plaintiff's royalty interests with respect to later leases secured from the Government, saying, p. 414:

> "Making application of this doctrine, it has been held that the assignment of an oil and gas lease reserving an overriding royalty, and providing that such reservation shall apply to all renewals, extensions and modifications, creates a trusteeship in the assignee, his successors and assigns for oil produced from a subsequent lease. *Probst v. Hughes,* 286 P. 875, 69 A.L.R. 929."

To the same effect, see *Howell v. Cooperative Refinery Assn.*, 176 Kan. 572, 271 Pac. 2d 271 (1954), *Kutz Canon Oil & Gas Co. v. Harr*, 56 N.M. 358, 244 Pac. 2d 522 (1952), and *Thornburgh v. Cole*, 201 Okl. 609, 207 Pac. 2d 1096 (1949).

Thus, where an overriding royalty owner's interest is a covenant running with the land or otherwise binds the successors in interest of the lessee-assignee, the underlying policy reasons preserving to the royalty owner, through the creation of a fiduciary relationship, his right to the continuation of his royalties in succeeding leases or assignments, extend also to preserving to that royalty owner his right to an accurate measurement or valuation and payment of that royalty interest. Where a royalty owner and/or his lessee-assignee insert into their written accord provisions for the making and receiving of performance *beyond the term of the lease*, they are thereby importing into that writing a fiduciary relationship relating not only to making and receiving performance, but to making and receiving it *in full* according to the terms relating to the measure of performance itself.

3. THE LA LAGUNA RANCH CASE, REFERRED TO BY APPELLANT, IS NOT INCONSISTENT WITH THIS WELL ESTABLISHED LAW. ON THE CONTRARY, IT ESTABLISHES THAT WHETHER OR NOT A COTENANCY RELATIONSHIP EXISTS IS A QUESTION OF "FACT" TO BE DETERMINED BY THE TRIAL COURT UPON THE EVIDENCE.

Commencing at page 36 of its brief, appellant belabors, at length, the contention that Kennedy, after the execution of the initial documents of transfer, had no *profit a prendre* to support a cotenancy in the "lease" lands, and, indeed, had no interest whatever in land sufficient to import a fiduciary relationship.

In attempted support of this argument, appellant quotes at length from the case of *La Laguna Ranch Co. v. Dodge,*

18 Cal. 2d 132, 114 Pac. 2d 351 (1941). Because this case and the two earlier cases of *Callahan v. Martin*, 3 Cal. 2d 110, 43 Pac. 2d 788 (1935) and *Payne v. Callahan*, 37 Cal. App. 2d 503, 99 Pac. 2d 1050 (1940), are of importance to the development of oil law in the State of California, and because the principles which they enunciate bear upon the case at bar, they are deserving of reference.

a. Callahan v. Martin.

In this case, the California Supreme Court had before it the question whether an oil royalty interest which had been assigned by the land owner from his reserved share survived a conveyance of the fee. Furthermore, as the court noted at page 114:

> "* * * the case involves the rights of an assignee of oil royalty under an assignment *unlimited as to duration*, not the rights of an assignee under an assignment limited to royalty to be realized from a designated lease." (The significance of the emphasis, which is ours, will appear presently.)

The court first set about to determine what the legal nature of a land owner's right to oil is. The court rejected the ruling followed in Texas and some other jurisdictions, that the land owner has an estate in the oil and gas in place beneath the surface, and concluded that the correct rule is that he has only the exclusive right to drill for oil and gas and to retain them when brought to the surface. The court next concluded that an operating lessee has an estate in real property, a *profit a prendre*. (Why the appellant attributes this latter determination to the later *La Laguna* case is not apparent.)

Considering next the status of the rights of the royalty owner's assignee, the court concluded that he, too, had an

estate in real property, an incorporeal hereditament, and reviewed at some length the common law background of this type of interest in real property.

Because the assignee's rights to a share of the land owner's royalties were not limited to the duration of the lease, the court held that the assignee was a tenant in common with the land owner in his reserved right to enter and drill for oil, i.e., in his *profit a prendre*, at the expiration of the existing lease. From this holding it followed that the assignee's right could not be cut off by the land owner's conveyance of the fee to a third party.

b. Payne v. Callahan.

Callahan v. Martin left open the question of the rights of an assignee of a royalty interest from an operating lessee after a quitclaim by the lessee to his lessor. The District Court of Appeal considered this question in the *Payne* case. The court observed, most significantly, that unlike *Callahan v. Martin*, the assignments in the *Payne* case were limited *to the term of the then existing lease*. Despite this distinction, the court concluded that the analogy to the earlier case was such that it should hold that the assignee of the lease received, by his assignment, a portion of the lessee's *profit a prendre*. The assignee was, therefore, a tenant in common with the lessee, and his rights could not be defeated by the lessee's quitclaim to the lessor.

c. La Laguna Ranch Co. v. Dodge.

In 1941 the California Supreme Court (which, it will be recalled, had decided *Callahan v. Martin*), had before it a fact situation which presented the same problem as in the *Payne* case—i.e., an assignment limited to the term of the then existing lease. The court reviewed the principles which

had been fixed by *Callahan*. It then observed that the lessor does not in every case intend to make his assignee a co-tenant in his exclusive right to drill for oil. With reference to the *Payne* case, the court stated (at page 138):

> "Thus, in so far as *Payne v. Callahan, supra,* holds that the fractional interests created either by the lessor or the operating lessee constitute a tenancy in common in a *profit a prendre as a matter of law,* it is expressly disapproved. In any case, the intention of the parties is controlling, and in the absence of a clear indication that such was the intent, the court will not construe royalty interests *created for the duration of a specific oil and gas lease* as granting the right to enter upon the land in question for the purpose of carrying on oil production or as creating a tenancy in common in the *profit a prendre* for that purpose." (Emphasis added.)

Since, under the facts before it in the *La Laguna* case, the royalty interests were created only for the duration of a specific lease, and nothing else indicated an intention that the assignee was to have the right of entry, the court affirmed the judgment quieting the land owner's title against the overriding royalty interest of the lessee's assignee.

A careful reading of these three cases makes apparent the point at which the District Court of Appeal in the *Payne* case deviated from the rules laid down by the Supreme Court in the *Callahan* case, ultimating in the disapproval expressed in the *La Laguna* case. The lower court went astray in failing to attach the significance which the Supreme Court had intended be given to the fact that, in the *Callahan* case, the assignee's royalty rights were not limited to the duration of the lease. Although the lower

court remarked upon this difference, it in effect ran roughshod over it.

The important thing to observe about the *La Laguna* case, as the Supreme Court specifically noted, is that it involved an assignee's rights *which were limited by the duration of a specific lease*—and the court specifically recognized that, were the assignee's rights not so limited, a different situation would obtain; and further stated that whether such different situation obtained was a question of fact to be determined from the document itself. But in the *La Laguna* case the Supreme Court was in no way overruling its earlier holdings in the *Callahan* case. It simply made clear that the *Payne* case had not interpreted *Callahan* correctly, and it positively reaffirmed the *Callahan* holding that a cotenancy relationship was created where the assignee's royalty rights were—as they are here—in perpetuity.

As we have observed earlier in this brief, appellant has conceded[1] that Kennedy and Kettleman Oil Corporation were co-owners of the mineral estate in the fee land because the conveyance was by grant with reservation to Kennedy of a portion of the oil and gas estate. But, appellant adds, as to the lease lands, no cotenancy could have existed because Kennedy reserved to himself no portion of the oil and gas estate, the reason for this being that he granted to the operating company all his rights of entry and possession. This specious reasoning will not stand close analysis under the principles enunciated by the *Callahan* and *La Laguna* cases.

The assignment of the prospecting permit to Kettleman Oil Corporation included an exclusive right of entry. But to conclude from this that no interest remained which could support a cotenancy is to beg the question. By the rulings of

1. Opening Brief, p. 37.

the *Callahan* and *La Laguna* cases it is clear that a royalty owner with no right of entry still has an interest in real property, labeled an "incorporeal hereditament." Indeed, even in the limited situation presented in the *La Laguna* case, the Supreme Court held (page 140):

> "Defendants' overriding royalties were, therefore, interests in real property."

Therefore, when Kennedy reserved a royalty from his interest under the permit, he carved out a lesser interest under the permit. This lesser interest may be the subject of a cotenancy, and when Kennedy made this incorporeal hereditament a *covenant running with the land,* he unambiguously evidenced his intention that a cotenancy be created.

What of appellant's argument that the essential element of unity of possession is lacking? There are several answers to this question. In the first place, it is to be observed that the California courts have recognized that the incorporeal interests created in oil are not susceptible of being precisely conformed to the classic molds for incorporeal hereditaments and that their incidents must be redefined. Thus in *Callahan v. Martin, supra,* at page 126, the court observed:

> "Of course, it is not to be contemplated from the circumstance that tenants in common in oil rights have coequal rights of entry, that a large number of investors holding assignments of small percentages in oil rights will wish, each for himself, to undertake the production of oil. It is not necessary for us here to determine in detail the rights *inter se* of those who as tenants in common are jointly interested in oil rights in land. * * * If numerous holders of oil rights in a single parcel of land are unable to agree upon an operating lessee or upon the terms of an oil lease, we are inclined to think that the powers of a court of equity may be invoked to formulate a just and reasonable plan for the develop-

ment and production of oil upon the land, and to settle the controversy in accordance therewith. But this can be determined as the question may arise in future litigation. The rules of law should be sufficiently adaptable to reach a desirable result in this developing field of law."

In *Dabney-Johnston Oil Corp. v. Walden,* 4 Cal. 2d 637, 52 Pac. 2d 237 (1935), the court stated, at page 656:

"The rule permitting nonproducing cotenants to share in oil produced by a single cotenant is justified by the difference in a cotenancy in mineral rights and such a tenancy in the surface estate. This rule has become well established, as indicated in the annotations to which we have referred. The propriety of the principle was recognized by this court in the early case of *McCord v. Oakland Q. M. Co., supra,* where the court said, at page 148: 'But it may be conceded for the purposes of this decision, that the relation of the tenants in common, under the circumstances disclosed, is *sui generis,* and their rights peculiar. That while the extraction of ore from the mine by one tenant, who does not exclude his cotenants, is not waste, and the neglect of the latter to enter should be held an assent on their part to the exclusive occupation by the former; yet, because of the effect of the exclusive working by one may be to exhaust the mineral, and the uncertainty of the prospective value of the property may render it impossible to make a just partition of it, a court of equity should order an accounting; holding that while it must have been contemplated by the parties that the tenant in occupation should not be held for waste, nor prohibited from proceeding with his work by the cotenants who do not seek to enter, yet it must also have been contemplated that the tenant in occupation should not appropriate to himself the entire profits.' "

Again, in the *La Laguna* case itself, the court took note of this development:

> "This court has recently referred to the fact that the traditional categories of real property interests crystallized long before interests such as these found their way into the courts. (*Callahan v. Martin, supra,* p. 115.) The law relating to such oil rights has been said to be in a formative stage and the interests thus created have been considered *sui generis.* (*Dabney-Johnston Oil Corp. v. Walden, supra,* pp. 650, 651; *Schiffman v. Richfield Oil Co., supra,* p. 226.) Thus, although only a portion of the oil royalties here considered can actually be compared to rent in the traditional sense, the purpose and scope of all such royalty interests are so similar that all should be considered equally to be incorporeal interests in real property, subject to the same requirements and protected by the same safeguards." (p. 139)

It is clear then that, in the light of this developing law, the "exclusive possession" language in the assignment of the permit must be construed as constituting an arrangement between cotenants of the *profit a prendre,* giving Kettleman exclusive operating rights only as long as it fulfilled all of the terms of the assignment. In the event of a material breach of the agreement by the operating lessee, or its successors, Kennedy, having reserved his right as a covenant running with the land, could step in and exercise his right of possession.

But, whether or not the assignment imports a tenancy in common of the *profit,* it is plain that Kennedy and Kettleman were co-owners of a mineral estate of indefinite duration—and therefore cotenants—just as surely as they were in the case of the fee land. As to the latter, Kennedy's grant with reservation preserved to him an interest in the mineral estate of which he had been the full owner prior to the grant. As to the prospecting permit, Kennedy's assignment with reservation preserved to him an incorporeal interest in the

real property which, whether or not it was a *profit*, was carved out of the *profit* assigned to Kettleman. Although Kettleman may have had a larger quantum of interest, if it was larger, it obviously included within its scope the same interest which Kennedy reserved, and they were co-owners and cotenants of this measure of incorporeal hereditament, whatever its label may be.

We have pointed out earlier in this brief that the admitted cotenancy relationship as to the fee land is sufficient, in this integrated transaction, to establish such a fiduciary relationship as to sustain the trial court's judgment. In addition to the foregoing, the cotenancy relationship between the parties as to the leased land becomes crystal-clear during the period for which the royalties in question were payable.

In reviewing the exhibits to the Statement of Agreed Facts, appellant comments, at page 29 of its brief, that it does not understand what pertinency Exhibit Y, the Kettleman North Dome Association Unit Agreement, has to any of the questions presented on this appeal. This document is pertinent for the following reason: It sets forth the rights and obligations of appellant's predecessor, with reference to the so-called Kennedy lease lands, as a member of the Kettleman North Dome Association during the period when the royalties in question were payable. Article II of the Kettleman North Dome Association Agreement provided that the members of the Association should transfer to it the exclusive possession for oil development purposes of the lands brought within the agreement, subject to a reservation as to non-participating lands.[1] Therefore, as to

1. Exhibit Y. Article II provides, in part, that Kettleman Oil Corporation (appellant) authorized the Association "* * * to take the exclusive possession of the lands described opposite its name as hereinafter subscribed for the purpose of development and opera-

Kettleman's participating lands or leases—which appellees agree are the only sources from which royalties are due them—Kettleman (appellant) assigned to the Association its *profit a prendre,* retaining the right to receive the oil produced, an incorporeal interest in real property of less quantum than a *profit a prendre*—so that, during the period here in question, the actual right of immediate possession was in neither the appellant nor appellees, but in the Association; and, as to the participating lands, appellant had no greater right than appellees, i.e., primarily the right to receive a share of the unit plan production. Thus, similarly as the unit plan operator stands in fiduciary relationship to both the royalty owners to whom it must pay royalties and to the lessee-assignee from which the unit operator obtained its operating rights (see *Young v. West Edmond Hunton Lime Unit,* 275 Pac. 2d 304 (Okl., 1954)), so also the assignee has fiduciary obligations to his assignor where he, and not the unit operator, is charged with the duty to pay the royalties due his assignor.

Looking at Kennedy's interest, after his assignment of the prospecting permit, in the light least favorable to him, he had at least *this same quantum of interest,* and since it was in the same lands and leases, there was an incontestable unity of possession and cotenancy during the very period when the royalties in question were earned.

The *La Laguna* case, therefore, is plainly not inconsistent with the District Court's decision in this case. It, at the

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tion of said lands for so long a period as oil or gas or other hydrocarbons shall be produced, or drilling operations shall be conducted by the Association on any of the lands included within this agreement." Frank Kennedy, as a royalty owner, had to give his consent to the inclusion in the Unit Plan of any lands in which he had an interest.

most, simply holds that, where an assignee's interest is limited to a specific document or term, the existence of a cotenancy is a question of fact to be determined from the documents themselves. *A fortiori*, therefore, where the documents creating the assignee's interest are "covenants running with the land" and running in perpetuity, it is clear that they create a cotenancy; and may even, under the holding of *Callahan v. Martin, supra*, create such a cotenancy as a matter of law. It is not necessary, however, to consider whether the *La Laguna* case, which applies solely to leases with a specified term, overrules the holding of the *Callahan* case—which applies to interests running in perpetuity. At the very least, the *La Laguna* case would hold such question to be a question of fact—and this question, as we have specified, has already been resolved by the trial court adversely to the appellant.

3. APPELLANT'S ASSUMPTIONS AND CONCLUSIONS TEND TO CONFUSE THE ISSUE, AND ARE NOT SUPPORTED BY LAW.

a. The existence of a fiduciary relationship must be determined from the operative facts in their actual context, and not from legalistic labels.

The fact that a fiduciary relationship existed between the parties is, as we have shown, to be determined by resort to the facts themselves—in this connection, primarily, the four original documents constituting the integrated statement of the relationship of the parties, one to the other. Appellant's brief, however, seeks to avoid this fact by the familiar device of holding up the definitions of several classic real property interests, and arguing that, since appellant conceives that this situation does not fall within those definitions, no fiduciary relationship exists.

The fallacies, however, of this Procrustean effort are self-evident—and it is well established that the traditional concepts of cotenancy and other forms of old English land tenure have long since yielded to developing conceptions—particularly with relation to the petroleum industry.[1] As the court states in *Dabney-Johnston Oil Corp. v. Walden, supra,* at page 650:

> "The failure of those who are dealing in oil rights to precisely describe the nature of the interests granted is due in part to the recent development of the oil industry. The law pertaining thereto is still in a formative stage. An analysis of the nature of oil interests which may be created involves an application of the common-law rules which crystallized before there were extensive dealings in subsurface fugacious substances. In the several jurisdictions in this country there is a contrariety of description as to the nature of these interests, and in a single jurisdiction, as in this state, there are conflicting expressions as to the description of oil interests. (See *Callahan v. Martin, supra.*) It is not surprising, in view of the lack of a definite terminology descriptive of these interests, that those who are dealing in oil interests have difficulty in describing the interest transferred, and that ambiguous and uncertain instruments are presented to the courts for analysis. Such instruments must be construed as a whole in the light of the circumstances under which they were executed and the expressed intent of the parties at that time. * * *"

Thus, when appellant, in its brief, devotes itself primarily to a citation of cases in which a "joint venture" was found not to exist upon particular facts, followed by a random

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1. See the quotations from *Callahan v. Martin, Dabney-Johnston Oil Corp. v. Walden,* and *La Laguna Ranch Co. v. Dodge,* commencing *supra,* p. 22.

collection of disparate cases dealing in general with mineral leases, including those for oil and gas, in which the "ordinary, everyday oil and gas lease, assignment, or reservation of royalties" did not create a fiduciary relationship, it is simply attempting to misdirect the attention of the Court. All of such argument is predicated upon appellant's assumption that the documents here in evidence, and considered singly, created nothing more than an "ordinary oil and gas lease", which is, in fact, the very point in issue, and the point of fact upon which the trial court ruled adversely to appellant.

So, when appellant asks, "What is a fiduciary?" we observe that it is amply established that such term imports a notion of good faith and trust by one party in another, with a concomitant duty in the trusted party to observe high ethical standards, and to protect and insure the interests of the trusting party. One situation where the imposition of fiduciary obligations is appropriate is that in which one party, after rendering that part of his performance which is prerequisite to the second party's duty to commence counter-performance, must completely depend upon the second party's good faith in giving the full extent of the consideration promised, because the second party is in a superior or exclusive position in determining the amount of counter-performance. That, of course, is the situation here.

Kennedy transferred certain interests in real property, which was all the performance required of him, prerequisite to the transferee's obligation to develop the lands, and to pay, either in oil or in money, stated shares or royalties from these lands if oil were discovered; and Kennedy covenanted to render further performance at the request of his transferee to the end of preserving and perfecting its permit interest. As to these two parties, the measure of

counter-performance due from Kettleman Oil Corporation (appellant) was in the latter's exclusive ability to determine. Kennedy had no means of determining the amount of royalties due under his integrated arrangement with Kettleman Oil Corporation at the outset, and much less after Kettleman Oil Corporation's interests were subdivided and assigned to various other oil companies, including appellant.

b. The form of the pleadings is not in issue.

Again, appellant is less than helpful when it inserts, in its brief, pages 48 to 51, an illusory issue regarding the form of complaint—for the form of the pleadings is not in issue. The sole question here is, as appellant concedes on pages 19 and 21 of its brief, whether a fiduciary relationship between the parties has been shown—and, if so, it is conceded that the judgment below is correct, and that appellant owes appellees the admitted sum of $9,519.11.

It is, of course, true that the averments in the complaint do not, of themselves, establish the fiduciary relationship between the parties, except in so far as appellant concedes the execution of the documents in question. However, these documents, and particularly the pertinent four original documents, have all been stipulated to by the parties; were evidence before the trial court; and were the basis of the trial court's determination on the pertinent facts involved.

c. Cases cited by appellant are not in point.

As we have already observed, most of the authorities cited by the appellant are concerned with situations where there was a specific lease only, with a specific term, or similar situation involved—but such is not the case here, where appellant's interest is an interest in perpetuity, and where,

under the prevailing law, it is clear that appellant's interest is that of a cotenant.

Further, however, we note that appellant appears to rely heavily upon *Phillips Petroleum Co. v. Bynum,* 155 Fed. 2d 196 (C.C.A. 5, 1946). In that case the court, reluctantly declining to impose a fiduciary obligation on a lessee, follows the paragraph quoted in appellant's brief, page 46, with the significant remark:

> "But in view of the *Texas law* that the royalty owner has no title even to the one-eighth part of the gas, and that only the contractual relationship of debtor and creditor exists, we are unable to fasten the obligation to make a full disclosure where it really ought to be." (Emphasis ours.)

Similarly, appellant cites *Phillips Petroleum Co. v. Johnson,* 155 Fed. 2d 185 (C.C.A. 5, 1946). Both of these cases, however, involve the application of *Texas* law, which conceives that a royalty owner does not have title to a part of the oil or gas. This, however, is not the law in California where a royalty owner's right to proceeds is considered to be a right of ownership in the oil itself and, as such, an incorporeal interest in land.

Taylor v. Odell, supra;
Recovery Oil Co. v. Van Acker, 79 Cal. App. 2d 639, 180 Pac. 2d 436 (1947), and cases cited therein;
Callahan v. Martin, supra.

In California, then, more than a mere debtor-creditor relationship exists, and the courts can and will enforce the obligation of a lessee to deal in good faith on a fiduciary basis with royalty owners.

Taylor v. Odell, supra;
Heaston & Glimpse v. West American Oil Co., supra.

Similarly, the case of *MacDonald v. Follett,* 142 Tex. 616, 180 S.W. 2d 334 (1944), cited by appellant, should afford it little solace. That case involved an overriding royalty interest, which, by *oral agreement,* was owned jointly by plaintiff and defendant. Upon the expiration of the lease, defendant took a new lease in his name as before, but did not then convey a half interest to the plaintiff, as he had under the previous lease. In determining whether plaintiff was entitled to a half interest as beneficiary of a fiduciary relationship, the court stated that if they had, as part of their oral agreement, agreed to work together to obtain a renewal of the lease, they were cotenants. The court then remanded the case for a determination of that factual issue—and the trial court's subsequent finding of a fiduciary relationship was upheld on the second appeal. See *MacDonald v. Follett,* 193 S.W. (2d) 287 (1946).

The cases of *O'Donnell v. Snowden & McSweeney,* 318 Ill. 374, 149 N.E. 253 (1925); *Fowler v. Associated Oil Co.,* 74 Pac. 2d 727 (1937); *Gordon v. Empire Gas and Fuel Co.,* 63 Fed. 2d 487 (C.C.A. 5, 1933); *Henry v. Gulf Refining Co.,* 179 Ark. 138, 15 S.W. 2d 979 (1929), and *Shropshire v. Hammond,* 120 S.W. 2d 282 (Tex. Civ. App. 1938); also cited by appellant, like many of the other cases cited by it, relate to "ordinary, everyday" oil leases, with specific terms, so that they are not here apposite.

4. CONCLUSION.

The decision of the trial court in this case does not present a complete re-writing of existing law, or the making of every debtor a trustee for his creditor, as appellant so broadly asserts.

On the contrary, we are here concerned with the specific language of four original documents creating a relationship

in perpetuity between two parties for the exploitation of oil properties for their mutual benefit. The decision in this case, therefore, is no broader than the specific language of the documents involved. When the trial court determined, as a question of fact, as it did, that such language was sufficient to create a fiduciary relationship between the parties, it did so, as we have shown, in response to well established law, and it was amply supported in its determination by the documents in evidence.

This same determination upon these precise documents has been made, not once, but, as we have shown, three successive times. We submit that there should be an end to the repeated re-arguing of this same contention; that there is no reason to disturb the decision of the trial court; that the appellees should have the sum of $9,519.11 concededly owing from appellant, and which is payable unless appellant can invoke its technical defense of the statute of limitations; and that the judgment of the District Court awarding appellees that amount should be affirmed.

Respectfully submitted,

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No. 15,049

United States Court of Appeals

For the Ninth Circuit

HONOLULU OIL CORPORATION,
a corporation,
Appellant,

vs.

KATHARINE H. KENNEDY and MARK C. ELWORTHY, Executors of the Will of Frank Kennedy, Deceased,
Appellees.

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

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Table of Contents

Index

Table of Cases

Statutes

Texts

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APPELLANT'S REPLY BRIEF.

INTRODUCTION.

Appellees in their brief urge that the judgment of the court below should be sustained upon two principal grounds: First, that this court should not examine the evidence in the case, consisting entirely of a Statement of Agreed Facts and documentary exhibits thereto, but rather is bound by the usual rule that a reviewing court will not, in the face of conflicting evidence, disturb the Findings of Fact or Conclusions of Law of the trial court. Appellees'

second point, stated in various ways throughout their brief, in sum amounts only to the contention that either a joint adventure, a cotenancy, or some other general fiduciary relationship existed between the parties which prevented the running of the statute of limitations. We shall take up in order the various points presented.

POINT ONE.

THIS COURT HAS NOT ONLY THE RIGHT BUT THE DUTY TO DRAW ITS OWN INFERENCES AND CONCLUSIONS FROM THE STATEMENT OF AGREED FACTS AND DOCUMENTARY EXHIBITS THERETO, AND IS NOT BOUND BY THE DETERMINATION OF THE LOWER COURT.

Appellees urge that this court should follow the general rule "that an appellate court will not disturb the findings of fact of the trial court." Yet they admit on page 3 of their brief that whether or not a fiduciary duty existed between the parties is a question of fact to be determined from the *documents* defining the respective interests of the parties.

The principle invoked by appellees is only applicable where a trial court has heard testimony, formed its conclusion as to the credibility of the witnesses, and drawn inferences and conclusions from the evidence. In such a case, the reviewing court will not retry the facts.

But this is not a case in which any witness was heard; there is no evidence other than the facts admitted by the pleadings, agreed to in the Statement

of Agreed Facts, or disclosed by the documents attached thereto as exhibits.

It is well settled that an appellate court may make its own inferences and draw its own conclusions from undisputed or stipulated facts or purely documentary evidence. As this court has stated in *Pacific Portland Cement Co. v. Food Mach. and Chem. Corp.,* 178 F.2d 541 (9th Cir. 1949) at page 548:

> ". . . we may make our own inferences from undisputed facts or purely documentary evidence."

The distinction between a case dependent upon the testimony of witnesses and one in which all the evidence rests upon documents or stipulated facts is well discussed in the case of *Tipton v. Bearl Sprott Co.,* 93 F.Supp. 496 (S.D. Cal. 1950). Here the court said at page 498:

> "It is the accepted rule that where a case is presented on stipulated facts, the mandate of Fed. Rules Civ. Proc. Rule 52, 28 U.S.C.A., that 'findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses' does not come into play. In short, when there are no witnesses, and the Court draws inferences from agreed facts, then the presumption of the correctness of the trial court's findings does not apply. The Courts have so held repeatedly, and have not hesitated to draw different legal conclusions from admitted facts."

Thus, in this case, this court has the power and the duty to draw its own inferences and conclusions from the stipulated facts and documents thereto.

Gillette's Estate v. Commissioner of Internal Rev., 182 F.2d 1010 (9th Cir. 1950);

American Eagle Fire Ins. Co. v. Eagle Star Ins. Co., 216 F.2d 176 (9th Cir. 1954);

McGah v. Commissioner of Internal Revenue, 210 F.2d 769 (9th Cir. 1954);

Eddy v. Prudence Bonds Corporation, 165 F.2d 157 (2nd Cir. 1947);

Wigginton v. Order of United Commercial Travelers, 126 F.2d 659 (7th Cir. 1942).

As stated in the *Wigginton* case (at p. 661):

> "Since the facts are not in dispute, we are free to consider them and to reach our own conclusion, untrammeled by the District Court's findings and conclusions of law. Especially is this rule applicable in the case at bar, where all the facts are stipulated."

POINT TWO.

THE APPELLEES HAVE FAILED TO DEMONSTRATE ANY RELATIONSHIP OF COTENANCY, COADVENTURE, CONFIDENTIAL RELATIONSHIP, FIDUCIARY RELATIONSHIP OR ANY OTHER RELATIONSHIP OF TRUST AND CONFIDENCE, WHICH WOULD TOLL THE STATUTE OF LIMITATIONS.

A. The fact that the pertinent documents were executed on or about the same day has no bearing on the relationship of the parties.

Appellees argue that, because the pertinent documents here involved were all executed at the same time, they constituted "an integrated plan" for the development of all the lands embraced therein, and that if a relationship of cotenancy existed between the parties

as to the "Kennedy fee lands," such relationship necessarily existed as to the "Kennedy lease lands." Appellees significantly have not cited any authorities in support of this startling proposition. In effect, it amounts to an assertion that the rights and obligations —as well as the status—of the parties to an instrument affecting one parcel of land are altered by an instrument executed on the same day as to another parcel of land. Thus, if A and B entered into an agreement of cotenancy as to Blackacre, and if on the same day A leased Whiteacre to B for a period of 5 years, the appellees would have us to believe that a relationship of cotenancy as to both Blackacre and Whiteacre was created. Such a rule would introduce confusion and uncertainty into the field of property law.

An analogous case which is directly against the appellees' contention is *Newell v. McMillan,* 139 Kan. 94, 30 P.2d 126 (1934). In that case certain lessors under oil and gas leases were attempting to enforce a $100 statutory penalty on five separate leases which were executed as one general transaction. It was urged that because the five separate leases were all a part of the same transaction, a separate penalty on each lease could not be collected. The court held that each lease must be considered as a separate and independent contract, saying at pages 131-2 (of 30 P.2d):

> "Five separate instruments leasing the separate tracts of land were executed and separately recorded. Each instrument evidenced a complete and independent contract."

In short, the Kennedy fee lands and the Kennedy lease lands were handled by the parties as totally dis-

tinct parcels, the parties having separate and independent rights and duties as to each parcel. That the parties intended no "integrated plan" is apparent from the fact that, although Kennedy consented to the inclusion of the lease lands in the Kettleman North Dome Agreement, he never consented to the inclusion therein of that portion of the Kennedy fee lands involved in this litigation. (Tr. 55)

Appellees' argument that an "integrated plan" resulted in a cotenancy or created a fiduciary relationship is neither founded upon the facts disclosed by the record nor upon any known principle of law.

B. The appellees have failed to demonstrate that the parties to this action have a fiduciary relationship which operates to toll the statute of limitations.

The primary case relied upon by appellees is *Taylor v. Odell,* 50 C.A.2d 115, 122 P.2d 919 (1942), but an examination of the decision reveals that in reality it is authority for the appellant's position. The facts of the case were that Odell, the defendant, orally asigned to Taylor, the plaintiff, an overriding royalty interest. Subsequently Odell leased the well to the Two-and-One Oil Company. For almost two years, Taylor received royalties, but after April 20, 1935, Two-and-One arbitrarily discontinued payment. Taylor did not commence his action until three years and two months after the parol agreement was repudiated. Thus a crucial question before the court was whether the suit was barred by Section 339 of the Code of Civil Procedure, which imposes a two-year statute of limitations upon actions founded on oral agreement, or whether

the period of limitation was governed by Section 343, which provides a four-year period as to actions for relief not otherwise provided for in the code.

The court held that Section 343 was applicable, and used language indicating that a trust relationship existed between the parties. (See 50 C.A.2d at 123-4). The opinion and the decisions on which it relies disclose that the court was speaking of a *constructive trust* relationship as a form of equitable relief.

See,

Hannah v. Canty, 175 Cal. 763, 167 Pac. 373 (1917);

Schiffman v. Richfield Oil Co., 8 C.2d 211 at 227, 64 P.2d 1081 (1937);

La Laguna Ranch Co. v. Dodge, 18 C.2d 132, 114 P.2d 351 (1941);

Dougherty v. California Kettleman Oil Royalties, 9 C.2d 58, 69 P.2d 155 (1937).

The actual holding of the case is that, although the agreement concerning royalties was oral, the suit was essentially an action to impose a constructive trust and was governed by the four-year statute of limitations applicable to action for relief not otherwise provided for in the code.

The court did not have before it, and did not discuss, the problem in the case at bar as to whether there was such a fiduciary relationship between the parties as would *toll the statute of limitations.* Where a fiduciary duty arises out of a *substantive* relationship such as beneficiary and trustee of an express trust, partnership, principal and agent, guardian and ward, etc., the

statute does not run so long as the fiduciary duty is not openly repudiated. However, the imposition of a *constructive trust,* which is a *remedial* device, does not thereby establish a fiduciary relationship which acts to toll the statute of limitations. It is well established in California that in the case of a constructive trust the statute begins to run at once upon the doing of acts by reason of which the trust arises, no repudiation being necessary to set the statute in motion.

Norton v. Bassett, 154 Cal. 411, 97 Pac. 894 (1908);

Broder v. Conklin, 121 Cal. 282, 53 Pac. 699 (1898);

Benoist v. Benoist, 178 Cal. 234, 172 Pac. 1109 (1918);

Lezinsky v. Mason Malt W.D. Co., 185 Cal. 240, 196 Pac. 884 (1921);

Earhart v. Churchill Co., 169 Cal. 728, 147 Pac. 942 (1915).

In other words, even if this court should find that Honolulu Oil Corporation or its predecessors in interest were constructive trustees as to the Kennedy royalty rights, there is, nevertheless, no fiduciary relationship such as will toll the running of the statute of limitations.

Actually, the case of *Taylor v. Odell* is authority for appellant. The court in that case (50 Cal.App.2d at page 124) clearly indicated that the statute of limitations started to run on the date the Two-and-One Oil Company refused to pay royalties. The court did not find a fiduciary relationship such as would toll the

statute of limitations. Indeed, if there had been such a relationship, it would have been unnecessary for the court to discuss the problem whether the two-year or four-year statute of limitations was applicable. The only reason the plaintiff prevailed in that case was that he commenced the action within four years after the nonpayment.

As to the case of *Heaston & Glimpse v. West American Oil Company,* 44 C.A.2d 107, 111 P.2d 905 (1941), cited on page 11 of appellees' brief, no more need be said than that the parties in that action had *agreed* that their substantive relationship was one of principal and agent, and was therefore fiduciary in nature. As stated by the court at page 110 (of 44 C.A.2d):

> "Appellant and respondent *agreed* that the contractual relationship the parties bore to each other was that of *principal* and *agent.* By the terms of the agreement * * * the appellant, who was the agent of the respondent, was obligated, *as a trustee,* to pay * * * until respondent's claim had been paid in full." (Emphasis supplied)

The record does not disclose the terms of the agreement creating the agency in that case nor does it indicate the extrinsic agreements which may have caused the parties to stipulate that a fiduciary relationship existed. Inasmuch as the existence or non-existence of a fiduciary relationship was not argued before the court, the decision furnishes no authority for appellees' broad proposition that in California an operating lessee is a trustee for the payment of assigned royalties. As the California Supreme Court has emphasized in

Maguire v. Hibernia S. & L. Soc., 23 Cal.2d 719, 146 P.2d 673 (1944), cases are not authority for propositions not argued and considered by the court.

Thus, the decisions cited by appellees do not support their position as to the vital question in this case, that is, whether any cotenancy, coadventure, or other fiduciary relationship existed between the parties which would toll the statute of limitations.

Appellees concede on page 14 of their brief that the usual, ordinary, every-day assignments, leases and operating agreements create no cotenancy, coadventure or other fiduciary relationship between the parties thereto. However, they urge that the agreements in this case involve "something more" than usual, ordinary, every-day assignments of an oil and gas lease. This "something more" is variously ascribed to covenants running with the land, to an alleged promise by Honolulu or its predecessors to acknowledge Kennedy's royalty interest in the event of extensions, modifications and renewals of the lease, and to the existence of a real property interest *in perpetuity* held by Kennedy and his successors. We shall examine each of these points in order.

C. Covenants running with the land do not create a fiduciary relationship.

On page 13 of their brief, appellees assert that covenants running with the land create a fiduciary relationship. In support of this statement three cases are cited. The first, *McClure v. Colyear,* 80 Cal. 378, 22 Pac. 175 (1889), involved a mother who breached her

fiduciary duty to her children by taking funds belonging to them and investing in property which was purchased in the name of her second husband. There was no discussion of covenants running with the land. The second case, *Heaston & Glimpse v. West American Oil Co.,* 44 C.A.2d 107, 111 P.2d 905 (1941), concerned a breach of trust between principal and agent who admitted their fiduciary relationship. Again covenants running with the land were not even remotely connected with the case and were not discussed by the court. In *Berniker v. Berniker,* 30 C.2d 439, 182 P.2d 557 (1947), the case involved a resulting trust, which arose when the father-in-law of plaintiff received funds belonging to her. Covenants running with the land were not mentioned in the decision.

Inasmuch as these cases are irrelevant, a brief examination of covenants running with the land is in order. Judge Charles E. Clark, in his famous study, *Real Covenants and Other Interests which "Run with Land,"* notes that the problem of covenants running with the land is one of rationalization or justification of the transfer of essentially contractual obligations to strangers. (See 2d edition, pages 1 through 5 and 209.)

See:

Reno, *Covenants, Rents and Public Rights,* II American Law of Property, Part 9, Section 9.1;

Holdsworth, *A History of English Law,* Vol. VII, pp. 287-292;

5 Restatement, Property, Introductory Note, pp. 3147-3161 (1944).

The distinguishing feature of a covenant running with a leasehold is that liability and enforcement of it are binding on subsequent transferees of the reversion or the leasehold interest even though such transferees did not expressly agree to assume any responsibility. In other words, if there is a covenant running with the land, it is unnecessary to establish privity of contract in order to enforce it; it is sufficient that the alleged obligor is in privity of estate with the party asserting the right.

Civil Code, Sec. 1460;

Stillwell Hotel Co. v. Anderson, 4 C.2d 463, 50 P.2d 441 (1935);

Bonetti v. Treat, 91 Cal. 223, 27 Pac. 612 (1891);

Los Angeles Term. Land Co. v. Muir, 136 Cal. 36, 68 Pac. 308 (1902);

Baker v. Maier & Zobelein Brewery, 140 Cal. 530, 74 Pac. 22 (1903);

14 *Cal. Jur.* 2d 17;

Burby, *Land Burdens in California—Covenants Running with the Land,* 4 So. Cal. L. Rev. 343 (1931).

Demonstrating the essentially contractual nature of covenants running with the land is the fact that the normal remedy for breach of such covenants is a judgment for damages. If this remedy is inadequate, equitable relief may be secured in accordance with the usual principles of contract law.

See:

Alderson v. Cutting, 163 Cal. 503, 126 Pac. 157 (1912);

Morgan v. Veach, 59 C.A.2d 682, 139 P.2d 976 (1943);

5 Restatement, Property, Secs. 528 and 529 (1944).

A covenant running with the land is essentially a contractual obligation with certain real property characteristics. Not one of the above authorities or cases suggests that a covenant running with the land creates a fiduciary duty. The practical effect of holding that a running covenant creates a fiduciary duty would be to convert every contract between a landlord and tenant into a fiduciary relationship inasmuch as the typical lease contains a covenant to pay rent or some other covenant which runs with the land.

Civil Code, Sec. 1464;

First Nat. Bank v. Aldridge, 33 C.A.2d 485, 92 P.2d 674 (1939);

Salisbury v. Shirley, 66 Cal. 223, 5 Pac. 104 (1884).

Inasmuch as a covenant running with land is essentially contractual, the breach of such a covenant immediately starts the running of the statute of limitations. The extreme proposition that a covenant running with the land creates a fiduciary duty which tolls the statute of limitations is totally unsubstantiated by reason and by authority.

D. A promise by Honolulu Oil Corporation or by any of its predecessors in interest to acknowledge an overriding royalty interest in Kennedy or his assigns in the event of an extension, modification or renewal of the lease does not create a fiduciary relationship which tolls the statute of limitations.

Appellees cite a series of cases on pages 14-17 of their brief such as *Probst v. Hughes,* 143 Okl. 11, 286 Pac. 875, 69 A.L.R. 929 (1930), and *Oldland v. Gray,* 179 F.2d 408 (10th Cir. 1950). These are decisions which establish a *constructive trust* as a method of equitable remedy *after* the breach of a promise to pay royalties in the event of extension, modification or renewal of an oil lease, that is, where there has been a refusal to recognize such royalty by one who has obtained an extension or renewal of the lease. Obviously, Honolulu or its predecessors have not breached any promise relative to the payment of royalties in the event of extension, modification or renewal of the leases here involved. Accordingly, the substantive relationship between the parties is still contractual, and is not affected by the fact that an equitable remedy might have been imposed had such a promise been broken.

Even if it be assumed arguendo that the promise to acknowledge Kennedy's royalty interest had been breached after an extension, modification or renewal of a lease, and even if it is assumed that such breach gives rise to a constructive trust, the availability of this equitable remedy does not create a fiduciary relationship which tolls the statute of limitations. See the above discussion concerning *Taylor v. Odell, supra.*

E. Any interest held by Kennedy was not in perpetuity, and did not import a cotenancy.

The leading case of *La Laguna Ranch Co. v. Dodge,* 18 C.2d 132, 114 P.2d 351 (1941), establishes that royalty interests created for the duration of a specific oil and gas lease would not be construed as creating a tenancy in common in a *profit a prendre,* in the absence of a clear indication that such was the intention of the parties. Appellees, having failed to point out any such indication, attempt to escape the mandate of the *La Laguna Ranch Co.* case by arguing that Kennedy's interest is "in perpetuity."

As to the lands here involved (the Kennedy lease lands) any interest Kennedy had under the pertinent agreements was not in perpetuity; it was necessarily limited to the duration of the leases and their renewals. As the California Supreme Court stated in *Dougherty v. California Kettleman,* 9 C.2d 58, 69 P.2d 155 (1937):

> "Obviously a royalty interest, such as is here involved, cannot rise to a greater dignity than the lease upon which it is predicated." (pp. 76-77)
>
> *La Laguna Ranch Co. v. Dodge, supra;*
>
> *Smith v. Drake,* 134 Cal.App. 700, 26 P.2d 313 (1933).

Certainly Kennedy's interest cannot be greater than the total interest which he held prior to the assignment to Honolulu's predecessors. Necessarily, Kennedy's rights were restricted to the duration of specific oil leases and their extensions, and are governed by

the unequivocal principle of the *La Laguna Ranch Co.* case, which holds that such rights do not create a cotenancy relationship.

The fact that Kennedy's rights might be of indefinite duration if the permit and leases were extended does not alter this conclusion. Indeed the *La Laguna Ranch Co.* case involved a lease for an indefinite duration of five years and for so long thereafter as drilling operations were being conducted or oil and gas were being produced in paying quantities.

In brief, the promise to pay royalties to Kennedy was limited to the duration of specific leases and their renewals, and did not create a cotenancy under the controlling principle of the *La Laguna Ranch Co.* case.

F. There was no coadventure relationship between the parties to this action.

In our opening brief, the requisite elements of a coadventure were set forth on pages 35 and 36. Appellees in their answering brief did not attempt to show the essential elements of a coadventure, that is, a community of interest in the object of the undertaking, an equal right to direct or govern the conduct of the other parties, and a sharing of profits and losses. Thus, they have in effect abandoned any contention that a joint adventure existed.

CONCLUSION.

The question before this court is clear: Was there such a fiduciary relationship between these parties that the statute of limitations was tolled? The relationship between these parties was established by various documents which are subject to inferences and conclusions to be drawn by this court untrammeled by the prior determination of the District Court. None of these documents disclose a coadventure, a cotenancy or any other fiduciary relationship. Appellees have failed to demonstrate in what manner these documents differ from the usual, ordinary, every-day assignments, leases and other contracts in use in the oil industry, which it is conceded do not create fiduciary obligations.

The proposition that a fiduciary relationship existed between the parties to this action depends upon theories advocated by appellees which have no foundation either in reason or authority. Honolulu respectfully submits that the decision of the court below should be reversed.

Dated, San Francisco, California,
July 30, 1956.

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No. 15050

United States Court of Appeals

for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

JAMES P. SANDERSON,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington, Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—6-8-56

No. 15050

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

JAMES P. SANDERSON,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington, Northern Division.

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

NAMES AND ADDRESSES OF COUNSEL

CHARLES P. MORIARTY and
RICHARD F. BROZ,

Attorneys for Appellant,

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Seattle 4, Washington.

MYRON L. BORAWICK,
WAYNE R. PARKER,

Attorneys for Appellee,

U. S. Post Office Bldg.,
Midway, Washington.

United States District Court, Western District of Washington, Northern Division

No. 3930

JAMES P. SANDERSON,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Comes Now the plaintiff and for cause of action against the defendant, complains and alleges:

I.

That jurisdiction of this action is conferred upon this Court by 28 United States Code, section 1346(a); 28 United States Code section 1402; and 8 United States Code 1329.

II.

That at all times herein mentioned and at present, plaintiff was and now is a resident of the City of Seattle, State of Washington, and within the jurisdiction of this Court.

III.

That on or about the 5th day of November, 1948, plaintiff deposited with the Seattle District Director of Immigration and Naturalization, one of defendant's officers, agents and employees, one United States Treasury bond of 1967-72, Serial Number 556845E, having a face value of One

Thousand Dollars ($1,000.00) bearing interest at the rate of 2½ per cent per annum and having 49 coupons attached having a face value of $12.50 each, payable June 15 and December 15; that said bond with attached coupons was deposited to guarantee the physical presence of one Eng Kam for deportation in the event said Eng Kam was to be properly deported by duly constituted authorities of defendant.

IV.

That in June, 1952, a petition for a Writ of Habeas Corpus on behalf of Eng Kam was heard before this Court in cause number 3045; that this court at that time held Eng Kam had not been given a fair hearing on his application for admission to the United States by the Immigration officers of defendant, and ordered that the Immigration authorities of the defendant at Seattle conduct a fair hearing on the proposed deportation of said Eng Kam in accordance with the rules of the Immigration Service and in accordance with the decisions of the Federal Courts; that this Court further ordered that Eng Kam be released from custody under the bond originally filed and hereinabove referred to.

V.

That on April 12, 1952, the Commissioner of Immigration and Naturalization at Washington, D. C., being a principal representative of the defendant, was advised that Eng Kam had been apprehended and was then in the custody of the officers of the defendant at Seattle pending the

outcome of habeas corpus proceedings filed in the District Court, at Seattle on the ground of an unfair hearing; that the receipt of said letter was acknowledged on May 6, 1952.

VI.

That during the time this Court had jurisdiction over the petition of Eng Kam above referred to, defendant acting by and through its agents, officers and employees in the Immigration and Naturalization Service did wilfully, wrongfully and unlawfully declare the bond plaintiff had on deposit with defendant forfeited and did forfeit said bond; that the exact date is unkown to plaintiff because plaintiff was not furnished with a copy of the final decision on appeal but has been advised by the representatives of the defendant that the said bond was ordered breached on May 26, 1952; that the sum of $50.00, in lieu of four coupons that had matured, was paid to plaintiff in September, 1952; that defendant, acting by and through its agents, officers and employees, wrongfully and unlawfully failed and refused and still fails and refuses to return said bond with attached coupons or its cash equivalent; that defendant so refused and refuses to return plaintiff's bond with coupons attached despite repeated demands made by plaintiff on defendant.

VII.

That Eng Kam was declared legally admissible to the United States of America by an order of the Board of Immigration Appeals, acting for and

in behalf of defendant, the date of said order being the 21st day of April, 1953; that a previous action by plaintiff setting forth substantially the same facts as herein recited was dismissed without prejudice by this Court on the 3rd day of November, 1953.

Wherefore, plaintiff prays for an order and judgment of this court that defendant be ordered to return the United States Treasury Bond 1967-72, Serial Number 556845E, face value $1,000.00 with all the coupons attached to date of judgment, less four coupons that have been paid for, to plaintiff, or in the alternative that plaintiff have judgment against defendant in the sum of $1,000.00 with interest at the rate of 2½ per cent per annum from June 16, 1948, less the value of the said four coupons, together with plaintiff's costs and disbursements herein.

/s/ MYRON L. BORAWICK,

/s/ STEWART LOMBARD,

Attorneys for Plaintiffs.

Duly verified.

[Endorsed]: Filed April 25, 1955.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, United States of America, and for answer to plaintiff's complaint herein admits, alleges and denies as follows:

First Defense

Defendant admits the allegations contained in paragraphs I, II, IV, and VI of plaintiff's complaint;

As to paragraph III admits the deposit of a U. S. Treasury Bond in the amount of $1,000.00 with the Immigration & Naturalization Service in a matter involving one Eng Kam, but denies each and every other allegation therein contained;

As to paragraph V denies each and every allegation therein contained;

As to paragraph VI admits that plaintiff's bond was declared breached by the District Director, Immigration & Naturalization Service, at San Francisco, on March 20, 1952, and also admits that defendant refuses to return said bond or the cash equivalent, denying, however, each and every other allegation therein contained.

Second Defense

Plaintiff fails to state a claim against defendant upon which relief can be granted, inasmuch as plaintiff has not pleaded all the pertinent provisions of the instant contractual agreement nor pleaded compliance with the conditions of said contract.

Third Defense

Plaintiff has failed to exhaust his administrative remedies provided under Title 8 C.F.R. Sec. 3-1(c).

Wherefore, having fully answered defendant demands that plaintiff's complaint be dismissed with prejudice and with costs.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ F. N. CUSHMAN,
Assistant U. S. Attorney.

Affidavit of Mail attached.

[Endorsed]: Filed June 30, 1955.

[Title of District Court and Cause.]

PRETRIAL ORDER

As a result of a pretrial conference heretofore had on September 29, 1955, in Room 613 of the United States Courthouse, Seatte, Washington, whereat the Honorable William J. Lindberg presided, the plaintiff was represented by Stewart Lombard and M. L. Borawick, and the defendant by Richard F. Broz, Assistant United States Attorney, their attorneys of record, the following issues of fact and law were framed and exhibits identified:

Admitted Facts

The following are the admitted facts herein:

1. That on November 5, 1948, the plaintiff herein executed a bond agreement which, among other things, provided for the posting of a $1,000 U. S.

Treasury bond bearing serial number 556845E, the purpose of which was to guarantee the delivery of one Eng Kam under certain provisions of said agreement. Both parties agree that said agreement, marked defendant's exhibit No. 1, may be admitted into evidence.

2. That on September 9, 1948, one Eng Kam, a native of China, arrived at San Francisco, California, and applied for admission as a son of a United States citizen under the provisions of Public Law 271, Act of December 28, 1945.

3. That on or about October 26, 1948, a Board of Special Inquiry found that Eng Kam was inadmissible under the provisions of Public Law 271 and ordered Eng Kam excluded and deported.

4. That pending appeal of the order of the Board of Special Inquiry to the Board of Immigration Appeals, Eng Kam was released from custody by the Immigration and Naturalization Service upon the posting of a bond by James P. Sanderson, plaintiff in the present action; that said bonding agreement may be admitted into evidence, and marked defendant's exhibit No. 1.

5. That annexed to said bond and made a part of it was a power of attorney executed by plaintiff herein, wherein he designated the Attorney General and his successors in office as his attorney to sell, collect, assign, and transfer the United States bonds or notes described therein, and recited further that such bonds or notes had been deposited by plaintiff

as security for the faithful performance of any and all of the conditions and stipulations of the bonding agreement, and that upon default of such performance, the Attorney General should have full power to cause the bond to be redeemed. That a photostatic copy of said power of attorney may be admitted into evidence and marked as defendant's exhibit No. 2.

6. That on January 10, 1949, the Commissioner of Immigration and Naturalization affirmed the excluding decision, and appeal was taken to the Board of Immigration Appeals by Eng Kam. On July 1, 1949, the Board of Immigration Appeals affirmed the decision of the Board of Special Inquiry, and dismissed the appeal.

7. That on October 19, 1950, the District Director of Immigration and Naturalization at San Francisco, California, made a demand on the surety to surrender Eng Kam at San Francisco, California, on November 15, 1950, for deportation. Plaintiff did not surrender Eng Kam on that date nor did he surrender him thereafter.

8. On March 5, 1952, Sanderson was notified by registered mail that the conditions of the bond had been violated by his failure to surrender Eng Kam pursuant to the Director's demand of October 19, 1950, and that if he desired he would be granted a period of ten days to submit any representations in writing as to why the bond should not be forfeited.

9. That upon independent investigation by the Immigration authorities, Eng Kam was apprehended by the Immigration Service at Newport, Washington, on March 28, 1952.

10. The District Adjudications Officer of the Immigration and Naturalization Service office at San Francisco ordered that the bond be declared breached as of November 15, 1950, which order was approved by the District Director of Immigration and Naturalization at San Francisco on March 20, 1952, and by the Commissioner of Immigration and Naturalization on May 26, 1952. Eng Kam brought habeas corpus proceedings in this court on March 31, 1952. An order was entered by the Court, after a hearing on June 9, 1952, granting the writ unless a rehearing be had before the Board of Special Inquiry within 30 days. Eng Kam was released on the $1,000 bond on deposit with the Immigration and Naturalization Service. The Court commented on the application of said order and a copy of the transcript containing the Court's comments may be admitted into evidence as defendant's exhibit No. 3.

11. The Commissioner of Immigration and Naturalization approved the order declaring the bond breached on May 26, 1952. On June 30, 1952, a Board of Special Inquiry was convened in Seattle for the purpose of rehearing in accordance with the Court's order. On July 1, 1952, the Board ordered Kam excluded.

12. On September 24, 1952, the Seattle Branch of the Federal Reserve Bank of San Francisco was

advised by the District Director of Immigration and Naturalization at Seattle that the security bond should be redeemed. On September 25, 1952, the Federal Reserve Bank deposited the amount of collateral to the credit of the United States.

13. Eng Kam in the meantime had appealed from the decision of the Board of Special Inquiry, and on April 21, 1953, the Board of Immigration Appeals reversed the decision of the Board of Special Inquiry, thereby sustaining the appeal of Eng Kam and admitting him to the United States as an alien under the provisions of Public Law 271.

Plaintiff's Contentions

Plaintiff's contentions are as follows:

1. That jurisdiction of this action is conferred upon this Court by 28 U.S.C., Section 1346(a); 28 U.S.C., Section 1402; and 8 U.S.C., Section 1329.

2. That the Commissioner of Immigration and Naturalization did not have authority to forfeit the Treasury bond on deposit to guarantee the physical presence of Eng Kam.

3. That the plaintiff has exhausted his administrative remedies.

4. That defendant, acting by and through its agents, officers and employees, wrongfully and unlawfully failed and refused and still fails and refuses to return said bond with attached coupons or its cash equivalent; that defendant should be ordered by the Court to return Treasury Bond

Serial No. 556845E, face value $1,000.00, with all coupons attached to date of judgment, less four coupons already paid for to plaintiff, or in the alternative that plaintiff have judgment against defendant in the sum of $1,000.00 with interest at 2½ per cent per annum from June 16, 1948, less the value of the four coupons, together with plaintiff's costs and disbursements herein.

Defendant's Contentions

Defendant's contentions are as follows:

1. That the transfer to the credit of the United States of the United States Treasury Bond containing serial number 556845E was fully authorized by the terms of the bonding agreement executed November 5, 1948, and the power of attorney conferred upon the Attorney General and his successors in office, marked Defendant's Exhibit No. 2.

2. That such transfer and exercise of the aforesaid power of attorney did not constitute a forfeiture.

3. That the present action is without merit, and should be dismissed by the Court with prejudice and with costs.

Issues of Law

The following are the issues of law to be determined by the Court:

1. Whether or not the transfer of United States Treasury Bond containing serial number 556845E to the credit of the United States, and the refusal

of defendant to deliver the same to the plaintiff, is authorized by the facts in this case, the bond agreement of November 5, 1948, and the power of attorney executed pursuant thereto.

Exhibits

The following exhibits were discussed and may be received in evidence if otherwise admissible without further authentication, it being admitted that each is what it purports to be:

Defendant's Exhibits

1. Duplicate copy of bonding agreement executed by plaintiff and defendant, dated November 5, 1948, and designated "Bond Conditioned for the Delivery of an Alien."

2. Photostatic copy of Power of Attorney executed by plaintiff in favor of the Attorney General or his successors in office, dated November 5, 1948.

3. Certified transcript of extract of proceedings from In the Matter of the Petition of Eng Kam, for Writ of Habeas Corpus, No. 3045, referred to in Admitted Fact No. 10 of the Pretrial Order.

The foregoing pretrial order has been approved by the parties hereto; as evidenced by the signatures of their counsel hereon, and upon the filing hereof the pleadings pass out of the case and are superseded by this order, which shall not be amended except by agreement of the parties and the approval of the Court.

Dated at Seattle, Washington, this 6th day of October, 1955.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Approved:

/s/ R. F. BROZ for
M. L. BORAWICK,
Attorney for Plaintiff.

/s/ CHARLES P. MORIARTY,
United States Attorney:

/s/ RICHARD F. BROZ,
Asst. United States Attorney.

[Endorsed]: Filed October 6, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Cause coming on for trial on the 6th day of October, 1955, plaintiff being present and represented by one of his attorneys, Myron L. Borawick, Esq., defendant being represented by Richard F. Broz, Assistant United States Attorney; the Court having heard the evidence, considered the exhibits on file, having heard argument of counsel, and being fully advised in the premises; the Court now makes and enters the following

Findings of Fact

I.

That service of the Complaint in this matter was properly made upon the defendant United States of America on the 26th day of April, 1955.

II.

That on or about the 5th day of November, 1948, and at all times since, plaintiff was and now is a resident of the City of Seattle, State of Washington, within the jurisdiction of the United States District Court for the Western District of Washington, Northern Division.

III.

That on or about the 5th day of November, 1948, plaintiff deposited with the Seattle District Director of Immigration and Naturalization, one of defendant officers, agents and employees, one United States Treasury bond, Serial Number 556845E, having a face value of One Thousand Dollars and having 49 coupons attached.

IV.

That at the time plaintiff deposited the foregoing bond, plaintiff entered into a bond agreement, the purpose of which was to guarantee the delivery of one Eng Kam to an officer or officers of defendant upon demand made according to the terms of said agreement; that said agreement is in evidence and marked "Defendant's Exhibit No. 1"; that attached to said bond agreement was a power of attorney executed by plaintiff; that a photostatic copy of

said document is in evidence and marked "Defendant's Exhibit No. 2."

V.

That on or about October 26, 1948, at a hearing before a Board of Special Inquiry, Eng Kam was found inadmissible as a son of a United States citizen and veteran under the provisions of Public Law 271, Act of December 28, 1945; that on January 10, 1949, the Commissioner of Immigration and Naturalization affirmed the excluding decision and an appeal was taken to the Board of Immigration Appeals by Eng Kam; that the decision of the Board of Special Inquiry was affirmed and the appeal dismissed on July 1, 1949, by the Board of Immigration Appeals.

VI.

That on October 19, 1950, the District Director of Immigration and Naturalization at San Francisco, California, made a demand upon plaintiff to surrender Eng Kam at San Francisco on November 15, 1950, for deportation; that Eng Kam was not surrendered on that date or thereafter; that there is no evidence that plaintiff knew where Eng Kam was on that date or thereafter until Eng Kam was apprehended by defendant's agents on March 28, 1952; that by a letter dated March 5, 1952, plaintiff was notified by registered mail that conditions of the bond had been violated by his failure to surrender Eng Kam pursuant to the Director's demand of October 19, 1950, and that if plaintiff desired, he would be granted a 10-day period to submit

representations in writing as to why the bond should not be forfeited.

VII.

That on March 31, 1952, Eng Kam brought habeas corpus proceedings in this Court; that at a hearing held before this Court on June 9, 1952, on Eng Kam's petition, it was determined that Eng Kam had not received a fair hearing before the Board of Special Inquiry hearing on October 26, 1948; that this Court ordered the Writ of Habeas Corpus granted unless a fair rehearing was given Eng Kam within 30 days of the date of hearing on the Habeas Corpus proceedings.

VIII.

That in accordance with this Court's order, a Board of Special Inquiry convened in Seattle on the 30th day of June, 1952, and, on July 1, 1952, ordered Eng Kam excluded; that Eng Kam appealed this decision and, on April 21, 1953, the Board of Immigration Appeals reversed the decision of the Board of Special Inquiry, sustained the appeal of Eng Kam, and admitted Eng Kam to the United States of America under the provisions of Public Law 271.

IX.

That by a letter dated March 25, 1952, plaintiff was advised by the District Director at San Francisco that said District Director had ordered the bond breached as of November 15, 1950, subject to the right of appeal within 10 days; that plaintiff

did appeal; that on May 26, 1952, the Commissioner of Immigration and Naturalization at Washington, D. C., affirmed the Order declaring the bond breached; that by letter dated April 12, 1952, the plaintiff advised the said Commissioner that Eng Kam was then held at the Immigration Station at Seattle, Washington pending habeas corpus proceedings on his right to remain in the United States; that a copy of said letter is in evidence and marked "Plaintiff's Exhibit No. 2"; that receipt of said letter was acknowledged by the Office of the Commissioner of Immigration and Naturalization.

X.

That on September 24, 1952, the Seattle Branch of the Federal Reserve Bank of San Francisco was advised by the District Director of Immigration and Naturalization at Seattle that the security bond posted by plaintiff on November 5, 1948, should be redeemed; that on September 25, 1952, the Seattle Branch of the Federal Reserve Bank of San Francisco deposited the amount of the bond deposited by plaintiff, less the value of 4 coupons which had been returned to the plaintiff, to the credit of the United States of America; that the value of said 4 coupons was Fifty Dollars.

XI.

That at no time has defendant returned to plaintiff the United States Treasury Bond, Serial Number 556845E, or its monetary equivalent; that the defendant did, in fact, forfeit said bond.

From the foregoing Findings of Fact, the Court makes and enters the following

Conclusions of Law

I.

That this Court has jurisdiction over the parties to this action, and over the subject matter of this action.

II.

That under the conditions of the bond agreement plaintiff entered into with defendant, Eng Kam was to be delivered to an immigration officer of defendant when it was finally and legally determined that he be deported.

III.

That the hearing before the Board of Special Inquiry on October 26, 1948, which found Eng Kam inadmissible to the United States under the provisions of Public Law 271 was unfair and improper, and the order of said Board excluding and deporting Eng Kam was invalid.

IV.

That the Order of the District Director of Immigration and Naturalization of October 19, 1950, demanding plaintiff to surrender Eng Kam at San Francisco, California, on November 15, 1950, for deportation was unlawful; that there was no lawful requirement or obligation on plaintiff to surrender Eng Kam for deportation on November 15, 1950, or at any date.

V.

That agents and officers of defendant forfeited the Treasury Bond, Serial Number 556845E which plaintiff posted at the time he entered into the bonding agreement with defendant.

VI.

That the conditions of the bond agreement which plaintiff executed on the 5th day of November, 1948, are to be strictly construed; that said agreement obligated plaintiff to deliver Eng Kam to officers and agents of defendant when it was finally and legally determined that Eng Kam was to be deported.

VII.

That the Order of the District Director of Immigration and Naturalization of October 19, 1950, demanding Eng Kam's surrender was unlawful and invalid, and the failure of plaintiff to do what was not lawfully required of him to do does not constitute a breach of his agreement of November 5, 1948, with defendant.

VIII.

That there has been no breach of the bonding agreement plaintiff executed on November 5, 1948, which would entitle defendant to forfeit the United States Treasury Bond posted by plaintiff with defendant.

IX.

That Eng Kam having been found to be admissible under the provisions of Public Law 271,

plaintiff is entitled to be exonerated as surety on the bond agreement he entered into on November 5, 1948.

X.

That defendant having wrongfully and without authority ordered plaintiff's bond breached, and having wrongfully and without authority forfeited the United States Treasury Bond, Serial Number 556845E, plaintiff is entitled to judgment against defendant United States of America in the sum of One Thousand Dollars ($1,000.00), with interest thereon at the rate of 4% per annum from the date of this Judgment to the date of the approval of any appropriations act providing for the payment of this Judgment, and for plaintiff's costs to which he is entitled by statute.

Done in Open Court this 19th day of October, 1955.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

/s/ M. L. BORAWICK,
One of Plaintiff's Attorneys.

Approved as to form and Notice of Presentation waived:

/s/ RICHARD F. BROZ,
Assistant U. S. Attorney.

[Endorsed]: Filed October 19, 1955.

United States District Court, Western District of Washington, Northern Division

No. 3930

JAMES P. SANDERSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This Court having heretofore made and entered its Findings of Fact and Conclusions of Law in this matter, Now, Therefore, and in accordance therewith:

It Is Hereby Ordered, Adjudged and Decreed that plaintiff James P. Sanderson be, and he is hereby exonerated as surety on the bond agreement entered into by and between plaintiff and defendant on November 5, 1948; and that plaintiff James P. Sanderson have Judgment against defendant United States of America in the sum of One Thousand Dollars ($1,000.00) with interest thereon at the rate of 4 per cent per annum from the date of this Judgment to the date of approval of any appropriations act providing for the payment of this Judgment, and for plaintiff's costs to which he is entitled by statute.

Done in Open Court this 19th day of October, 1955.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

/s/ M. L. BORAWICK,
Attorney for Plaintiff.

Approved as to form and Notice of Presentation waived:

/s/ RICHARD F. BROZ,
Asst. United States Attorney.

[Endorsed]: Filed October 19, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: James P. Sanderson, plaintiff; and to M. L. Borawick, attorney for plaintiff; and to Millard Thomas, Clerk of the U. S. District Court for the Western District of Washington:

Notice Is Hereby Given that the United States of America, defendant in the above-entitled action, does hereby give notice of appeal from the final judgment entered in Cause No. 3930 on the 19th day of October, 1955, by the Honorable William J. Lindberg, United States District Judge,

Said appeal being taken to the United States Court of Appeals for the 9th Circuit.

Dated this 16th of December, 1955.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ RICHARD F. BROZ,
Assistant United States Attorney, Attorneys for Defendant.

[Endorsed]: Filed December 16, 1955.

In the District Court of the United States for the Western District of Washington, Northern Division

Number 3930

JAMES P. SANDERSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Transcript of Testimony of James P. Sanderson, Plaintiff in the above-entitled and numbered cause, and Decision of the Honorable William J. Lindberg, a United States District Judge, given on the 6th day of October, 1955, commencing at 10:00 o'clock a.m., at Seattle, Washington.

Appearances:

MYRON L. BORAWICK,
Appeared for and on Behalf of the Plaintiff; and

RICHARD F. BROZ,
Assistant United States Attorney, Western District of Washington, Appeared for and on Behalf of Defendant.

PROCEEDINGS

The Clerk: James P. Sanderson, Plaintiff, vs. United States of America, Defendant, Cause Number 3930; Myron L. Borawick appearing for the

Plaintiff: Richard F. Broz, Assistant United States Attorney, appearing for the Defendant.

The Court: Is the Plaintiff ready?

Mr. Borawick: The Plaintiff is ready.

Mr. Broz: The Defendant is ready.

(Opening statement made for and on behalf of the Plaintiff by Mr. Borawick: opening statement waived for and on behalf of the Defendant by Mr. Broz: and the following proceedings were then had, to wit:)

The Court: You desire to present testimony?

Mr. Borawick: Yes, your Honor, I would like to call Mr. Sanderson as a witness. [2*]

JAMES P. SANDERSON

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

By Mr. Borawick:

Q. Would you please state your name and address, sir?

A. James P. Sanderson. I live at 6045 Seward Park Avenue, Seattle.

Q. And what is your occupation, Mr. Sanderson?

A. I am at the present time an attorney.

Q. You are the Plaintiff in this matter?

A. Yes.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of James P. Sanderson.)

Q. Mr. Sanderson, did you have occasion on the fifth of November, 1948, to deposit a certain United States Treasury Bond of the value of one thousand dollars ($1,000.00), with the Seattle District Director of Immigration and Naturalization?

A. Yes.

Q. This was Treasury Bond 196772; is that correct? A. Yes.

Q. Now, calling your attention to March of [3] 1952, did you receive any notice regarding a breach of the bond?

A. I did, from the Office at San Francisco.

Mr. Borawick: Will you mark this?

The Clerk: Plaintiff's Exhibit Number 1 marked for identification.

(Plaintiff's Exhibit 1 marked.)

Q. (By Mr. Borawick): I show you Plaintiff's Exhibit 1 for identification and ask you if you recognize it? A. I do.

Q. What is it, Mr. Sanderson?

A. It is a notification that this bond, filed in this case, was ordered breached.

Q. And that is a copy of the notice you received, is that correct? A. Yes.

Mr. Borawick: I offer this as Plaintiff's Exhibit 1.

(Whereupon, proposed exhibit was handed to Counsel for Defendant.)

Mr. Broz: No objection.

(Testimony of James P. Sanderson.)

The Court: Exhibit Number 1 may be admitted. [4]

(Plaintiff's Exhibit 1 admitted.)

PLAINTIFF'S EXHIBIT No. 1

Registered Mail. Return Receipt Requested.

United States Department of Justice, Immigration and Naturalization Service, San Francisco, California

File No. A7054617

Date: March 25, 1952.

J. P. Sanderson, Attorney at Law,
Second Avenue and Cherry Building,
Seattle, Washington.

Dear Sir:

On March 5, 1952, you were notified that the condition of the bond on which you are an obligor with respect to the alien Eng Kam appear to have been violated. It has been concluded that the bond executed by you has been breached for the reason stated in the attached copy of the order declaring the bond breached.

You are advised that you have the right to appeal within ten days after the receipt of this decision to the Commissioner of Immigration and Naturalization Service, Washington, D. C. Please return the attached copy of this letter, appropriately marked

(Testimony of James P. Sanderson.)

to indicate your desire as to appeal. If you desire to submit a brief in connection with your appeal, it should be forwarded to this office in order that it may be sent forward with the other papers in your case.

Very truly yours,

BRUCE G. BARBER,
District Director,
San Francisco District.

By /s/ CHAS. H. KINGSBURY,
District Adjudications Officer.

☒ I do desire to appeal from the above decision.
☐ I am attaching brief for the consideration of the Commissioner.

/s/ J. P. SANDERSON,
Signature of Bondsman.

Admitted in evidence October 6, 1955.

The Court: May I see it?

(Whereupon, exhibit was handed to the Court.)

The Court: You may proceed, Mr. Borawick.

Mr. Borawick: Thank you, your Honor.

Q. (By Mr. Borawick): Now, following the apprehension of Eng Kam in March, 1952, did you bring a habeas corpus action in his behalf?

A. I did.

Q. Do you recall, Mr. Sanderson, when that action was brought?

(Testimony of James P. Sanderson.)

A. It was filed on March 31, 1952, to the best of my knowledge and belief.

Q. And that was before this Court, is that right?

A. Yes.

Q. Did you notify the Commissioner of Immigration and Naturalization in Washington of the fact that this action had been filed——

A. (Interposing): I did.

Q. ——on behalf of Eng Kam? [5]

A. I did.

Mr. Borawick: Will you mark this, please?

The Clerk: Plaintiff's Exhibit Number 2 marked for identification.

(Plaintiff's Exhibit 2 marked.)

Q. (By Mr. Borawick): I show you what has been marked for identification as Plaintiff's Exhibit 2. Do you recognize that, sir? A. Yes.

Q. What is it?

A. I advised the Commissioner at Washington that Eng Kam had been made the subject of habeas corpus proceedings at Seattle and it was intended to advise the Commissioner that further action should be stayed pending the final decision of this Court.

Q. And this is a copy of that letter, is that correct? A. Yes.

Mr. Borawick: I offer this as Plaintiff's Exhibit 2.

Mr. Broz: No objection.

The Court: Exhibit 2 may be admitted. [6]

(Testimony of James P. Sanderson.)

(Plaintiff's Exhibit 2 admitted.)

PLAINTIFF'S EXHIBIT No. 2

April 12, 1952.

Commissioner,
Immigration & Naturalization Service,
Washington, D. C.

Dear Sir:

In re: Eng Kam, A-7054617 WU, January 15, 1951.

Forfeiture of bond filed in this case is now up for consideration.

The subject was recently apprehended and is now in the custody of the District Director at Seattle, pending the outcome of habeas corpus proceedings scheduled for trial in the district court on May 5, 1952. It is alleged that the hearing before the Service was unfair and if the court so holds it would seem that the bond should not be forfeited.

Yours truly,

/s/ J. P. SANDERSON.

Admitted in evidence October 6, 1955.

Mr. Borawick: Will you mark this, please?

Q. (By Mr. Borawick): Did the Commissioner of Immigration and Naturalization acknowledge receipt of that particular letter, Mr. Sanderson?

(Testimony of James P. Sanderson.)

A. Yes.

The Clerk: Plaintiff's Exhibit Number 3 marked for identification.

(Plaintiff's Exhibit 3 marked.)

Q. ((By Mr. Borawick): I show you Plaintiff's Exhibit 3 for identification. Do you recognize that document? A. I do.

Q. What is it, Mr. Sanderson?

A. It is an acknowledgment of the letter that I wrote to him on April 12, 1952, just discussed.

Mr. Borawick: I offer this as Plaintiff's Exhibit 3.

Mr. Broz: No objection, your Honor.

The Court: Exhibit Number 3 may be admitted. [7]

(Plaintiff's Exhibit 3 admitted.)

PLAINTIFF'S EXHIBIT No. 3

United States Department of Justice
Immigration and Naturalization Service
Washington 25, D. C.

Please Address Reply to
And Refer to This File No.: A-7054617-T.

May 6, 1952.

J. P. Sanderson, Esquire,
Second Avenue and Cherry Building,
Seattle 4, Washington.

(Testimony of James P. Sanderson.)

Dear Mr. Sanderson:

Reference is made to your letter of April 12, 1952, concerning the bond in the case of Eng Kam.

Your communication is being forwarded to the District Director of this Service at Seattle, Washinton. That official will advise you further in the matter.

Sincerely yours,

/s/ W. F. KELLY,
Assistant Commissioner,
Enforcement Division.

Admitted in evidence October 6, 1955.

Q. (By Mr. Borawick): Now, calling your attion again to the notification of the breach of the bond which you received in March, 1952; did you file an appeal brief in accordance with that letter?

A. I filed an appeal in accordance with the regulations existing at that time.

Q. Did you ever receive acknowledgement from the Seattle Office of the Immigration and Naturalization Service of this appeal brief having been filed? A. Had not been filed?

Q. Had been filed? A. Yes.

Mr. Borawick: Would you mark that, please?

(Testimony of James P. Sanderson.)

The Clerk: Plaintiff's Exhibit Number 4 marked for identification.

(Plaintiff's Exhibit 4 marked.)

Q. (By Mr. Borawick): I show you what has been marked for [8] identification as Plaintiff's Exhibit 4. Do you recognize that, sir?

A. I do.

Q. What is it?

A. It is merely an answer to my letter inquiring about breaching and forfeiting the bond, and they advised that the case had been appealed to the Commissioner-Assistant Commissioner of the Adjudications Division of the Immigration Service at Washington, D. C., and that the appeal was dismissed and the collateral forfeited.

Q. And that is from what office of the Immigration Service?

A. That is from the Seattle Immigration Office, August 5, 1952.

Mr. Borawick: I offer this as Plaintiff's Exhibit 4, your Honor.

Mr. Broz: No objection, your Honor.

The Court: Exhibit 4 may be admitted.

(Plaintiff's Exhibit 4 admitted.)

(Testimony of James P. Sanderson.)

PLAINTIFF'S EXHIBIT No. 4

United States Department of Justice
Immigration and Naturalization Service
815 Airport Way
Seattle 4, Washington

Please Refer to This File Number: A-7054617.

August 5, 1953.

James P. Sanderson, Esquire,
Attorney at Law,
Second Avenue and Cherry Building,
Seattle 4, Washington.

Dear Sir:

Reference is made to your letter of July 27, 1953, concerning this bond deposited in behalf of Eng Kam in 1948.

As you know, an order was entered by the District Director, San Francisco, California, in 1952 declaring the bond breached and the collateral forfeited. This matter was appealed to the Assistant Commissioner, Adjudication Division, Immigration and Naturalization, Washington, D. C. The appeal was dismissed, and since that time the collateral has been forfeited.

Respectfully,

/s/ JOHN P. BOYD,
District Director.

Admitted in evidence October 6, 1955.

(Testimony of James P. Sanderson.)

Q. (By Mr. Borawick): Now, Mr. Sanderson, did you follow the administrative procedure outlined in that letter notifying you of the breach of that bond back in [9] March, 1952?

A. I appealed the case in the regular way.

Q. Was Eng Kam finally admitted to the United States? A. He was.

Q. When was that, Mr. Sanderson?

A. That was sometime in 1953.

Q. Have you ever received back the one thousand dollar bond which was deposited November 5, 1948. A. No.

Q. Have you ever received the cash equivalent of this bond from the United States or any of its agents? A. No.

Q. Have you received any of the coupons back which were attached to the bond?

A. I received four, the value of four, coupons: twelve-fifty ($12.50) each or a total of fifty dollars ($50.00).

Mr. Borawick: Would you mark this, please?

The Clerk: Plaintiff's Exhibit Number 5 marked for identification.

(Plaintiff's Exhibit 5 [10] marked.)

Q. (By Mr. Borawick): When did you receive the final decision on the breach and forfeiture of the bond, if you did?

A. I wrote to the various offices of the Immigration Service several times requesting information on that point but I never did receive a copy of the

(Testimony of James P. Sanderson.)

final order forfeiting or breaching the bond until some time this year, or about three years after it was declared forfeited.

Q. I show you what has been marked for identification as Plaintiff's Exhibit 5. Do you recognize that document of two (2) pages?

A. There are two documents here. One is from the Immigration Office at San Francisco, May 16th, advising that the bond had been breached and contains a copy of the final order breaching the bond, or affirming the order forfeiting the bond, of 1952. This is by the Assistant Commissioner of the Adjudications Division at Washington, D. C. In other words, it is the final order.

Q. And that was in May of what year, Mr. Sanderson?

A. It is dated May 26, 1952, but I didn't receive it until 1955. [11]

Mr. Borawick: I offer this as Plaintiff's Exhibit 5.

Mr. Broz: No objection, your Honor.

The Court: Exhibit 5 may be admitted.

(Plaintiff's Exhibit 5 admitted.)

(Testimony of James P. Sanderson.)

PLAINTIFF'S EXHIBIT No. 5

United States Department of Justice
Immigration and Naturalization Service
San Francisco, California

In Replying Please Refer to This File Number: A-7054617.

May 16, 1955.

Mr. J. P. Sanderson,
Attorney at Law,
Second Ave. & Cherry Building,
Seattle 4, Washington.

Dear Sir:

Reference is had to your letter of May 5, 1955, addressed to the Commissioner of Immigration and Naturalization, Washington, D. C., in which you question whether your appeal on the order of the District Director, San Francisco, breaching the bond in the case of Eng Kam, was ruled on by the Commissioner.

As the original decision is contained in the San Francisco file, we are enclosing herewith a copy.

Very truly yours,

BRUCE G. BARBER,
District Director;

By /s/ ARTHUR J. KAHL,
Chief, Examinations Branch.

Encl.

(Testimony of James P. Sanderson.)

Form G-346

(10-30-51)

U. S. Department of Justice
Immigration and Naturalization Service

APPEAL FROM DISTRICT DIRECTOR'S DECISION

File No.: A-7054617 Adj.

Date: April 14, 1952.

To: Commissioner.

From: District Director, San Francisco District.

By: Chas. H. Kingsbury, District Adjudications Officer.

Subject: Eng Kam.

Section: 8 CFR 169.3.

Note: This alien has been apprehended in the Spokane District and the file has been forwarded to that office for use in habeas corpus proceedings.

Pursuant to above-cited regulation, entire file relating to the subject, including timely appeal, is transmitted for decision.

(Testimony of James P. Sanderson.)

A-7054617 AAS.

Date: May 26, 1952.

To: District Director, San Francisco, California.

From: Commissioner.

By: Assistant Commissioner Adjudications Division. Central Office.

The decision and order of the District Director in the above-cited case is affirmed. Temporary file A-7054617 is forwarded herewith.

/s/ ELEANOR ENRIGHT,
Assistant Commissioner,
Adjudications Division.

Enclosure Registered:

(Copy)

Admitted in evidence October 6, 1955.

Q. (By Mr. Borawick): Do you recall the rate of interest which that one thousand dollar bond bore, Mr. Sanderson?

A. Two and one-half per cent (2½%).

Mr. Borawick: Your witness.

(Testimony of James P. Sanderson.)

Cross-Examination

By Mr. Broz:

Q. Mr. Sanderson, did you receive a letter of demand dated October 19, 1950, that the plaintiff, for which you were obligator on the bond, produce Eng Kam in San Francisco?

A. I did receive such a notification.

Q. You received such a notification?

A. Yes.

Q. Did you offer to surrender Eng Kam after receiving that demand?

A. No; for the reason that I instituted the correspondence to begin with and asked the Immigration Service to proceed with the case so that the [12] Government would be the plaintiff and at the prospect of trial I expected to show that the boy was entitled to be admitted to the United States and also that the Government had no authority to breach the bond administratively.

Q. You were relying then on your writ of habeas corpus, your petition for writ of habeas corpus, to forestall any action that the immigration Service might take on your bond? A. Finally, yes.

Q. However, you did receive the notice and you were aware that the bond provided that upon demand of the Immigration Service you were to surrender Eng Kam?

A. Yes, but I didn't recognize that the Government had any authority to make such a demand.

(Testimony of James P. Sanderson.)

Q. You executed the bond agreement on November 15, 1948? A. Yes.

Q. That was November 5, 1948?

A. Whatever date it was. I concede that.

Q. And you were aware of the provisions that were on the bond? A. Yes.

Q. Were you aware that there was a [13] provision on the bond relating to the amount of collateral being a provision for liquidated damages rather than a penalty?

A. Yes. I didn't—while I didn't pay much attention to it, whatever I signed is correct.

Q. At the time when the Immigration and Naturalization Service demanded that you produce Eng Kam in San Francisco on November 15, 1950, did you know where Eng Kam was?

A. No. No, I don't think so.

Q. Is your answer that you don't recall or that you did not know where he was?

A. Well, off hand, to the best of my memory, I would say that I did not know where he was. I am satisfied I did not know where he was at the time he was apprehended.

Q. You don't recall whether or not you knew where he was at the time you received the letter of demand?

A. I would say that I did not, no.

Mr. Broz: Will you mark this for identification, please?

The Clerk: Defendant's Exhibit Number 1 marked for identification.

(Testimony of James P. Sanderson.)

The Court: Is that A-1? [14]

The Clerk: A-1.

(Defendant's Exhibit A-1 marked.)

Q. (By Mr. Broz): Mr. Sanderson, I hand you what purports to be a letter. Do you recognize it, sir? A. Yes.

Q. What is it?

A. Well, it is just to acknowledge receipt of notice about the presenting of Eng Kam for deportation.

Q. You did receive this? A. Yes.

Mr. Broz: I will offer this exhibit in evidence.

Mr. Borawick: No objection.

The Court: Exhibit A-1 may be admitted.

(Defendant's Exhibit A-1 admitted.)

DEFENDANT'S EXHIBIT A-1

Form I-322
(10/5/51)
Registered Mail—Return Receipt Requested.

A7054617 Adj.

United States Department of Justice Immigration and Naturalization Service, San Francisco, California, March 5, 1952

Jas. P. Sanderson, Attorney at Law,
Second Avenue and Cherry Building,
Seattle, Washington.

Dear Sir:

As an obligor on the bond executed on November 5, 1948, with respect to the alien(s) Eng Kam, you

(Testimony of James P. Sanderson.)

are hereby notified that the condition(s) of that bond appear to have been violated in that he failed to appear as demanded on 11-15-50.

This office proposes to submit a report to the district director for his decision as to any further action to be taken with respect to the bond.

If you desire to do so, you may on or before 10 business days from receipt of this letter submit to this office in writing any representations which you desire to make as to why the condition(s) of the bond should not be declared breached and the amount of the obligation thereunder declared forfeited. Any representations that you make will accompany the report of this office to the district director and will be considered by him. In order that your representations may be properly considered as a part of the case, it is suggested that you submit them to this office and not directly to the district director.

/s/ CHAS. M. KINGSBURY,
Officer in Charge Adjudications.

PRM:rr

Return Receipt attached.

Admitted in evidence October 6, 1955.

(Testimony of James P. Sanderson.)

Q. (By Mr. Broz): That letter which has just been admitted into evidence stated that you had ten days in which to file written objections to the order of the District Director declaring that the bond be breached? [15] A. Yes.

Q. Did you ever file a written objection to the District Director's order?

A. I did. The previous exhibit proves that point.

Q. In what form was your written objection?

A. It was written on a typewriter of several pages giving the reasons for my objections.

Q. Was that the letter—is that the document you referred to as an appeal? A. Yes.

Q. Where did you file that, sir?

A. I beg pardon?

Q. Where did you file that?

A. I filed that with the Commissioner of Immigration at Washington, D. C.

Q. Do you recall that the letter just admitted into evidence requested you file any objections in writing to the District Director at San Francisco?

A. Well, I undoubtedly did file it at San Francisco; through the San Francisco office to the Office at Washington.

Q. Do you recall ever writing a letter to the office at San Francisco outlining your objections to [16] why—as to why the bond should not be breached?

A. I don't remember that, but I did file the appeal on the objections in accordance with the regulations. The San Francisco Office was aware of

(Testimony of James P. Sanderson.)

it. I think I sent it through the San Franciso Office, but I am not sure. But, that point was satisfied, anyway, when the Assistant Commissioner finally affirmed the order.

Q. When did you first know that the bond had been transferred to the credit of the United States?

A. Would you repeat that, please?

Q. When were you first aware that the bond which you had posted as collateral had been transferred to the credit of the United States?

A. I was advised, I think, in nineteen—well, I didn't so far as I can recall I didn't—receive any satisfactory information until I got notice that the coupon bonds in the amount of fifty dollars ($50.00) were returned.

Q. And when was that, sir?

A. I think that was in September, 1953.

Q. September, 1953?

A. But I think that I did receive some indication from the Service before, in 1952, that the bond had been breached, but I am not sure. The [17] exhibits will take care of that.

Q. Do you recall the approximate date when you became aware that the bond had been deposited with the Federal Reserve and the amount of the bond credited to the United States?

A. The——

Q. (Interposing): Did you receive any correspondence from the Service in regard to that?

A. No; not until—I don't remember that but there wasn't anything definite at all until I got the

(Testimony of James P. Sanderson.)

copy of the order affirming the breaching of the bond. That was in May, 1955.

Q. Did you ever inquire prior to that time as to what had happened to the bond?

A. I made several inquiries to the Immigration Service in regard to the bond.

Q. By telephone? A. By letter.

Q. Did you receive any response?

A. Yes; I—one of the exhibits that has been presented shows that.

Q. What was the response?

A. The response was that the bond had been ordered breached.

Q. Did you conclude at that time that the [18] bond had been transferred to the United States; that it had been, in effect——

A. (Interposing): Well, I took it for granted that the bond was transferred to the United States when these coupons were returned without any letter of explanation.

Mr. Broz: I have no further questions.

Redirect Examination

Mr. Borawick: Will you mark this, please?

The Clerk: Plaintiff's Exhibit 6 marked for Identification.

(Plaintiff's Exhibit 6 marked.)

Q. (By Mr. Borawick): I show you Plaintiff's Exhibit 6 for identification, Mr. Sanderson. Do you recognize that? A. I do.

(Testimony of James P. Sanderson.)

Q. What is it, sir?

A. Well, it is a letter to the Commissioner of Immigration in Washington, of September 26th, in regard to the intention of forfeiting this one thousand dollar bond.

Mr. Borawick: I offer this as Plaintiff's Exhibit 6, your Honor. [19]

Will you mark this?

The Clerk: Plaintiff's Exhibit Number 7 marked for identification.

(Plaintiff's Exhibit 7 marked.)

Mr. Broz: I will object to the document unless Counsel lays a proper foundation for its admission.

Mr. Borawick: Well, if the Court please, questions have been asked on cross-examination concerning——

The Court (Interposing): May I see the exhibit?

Mr. Borawick: Yes, sir.

(Whereupon, proposed exhibit was handed to the Court.)

(Whereupon, there was a brief pause.)

The Court: All right, Mr. Borawick.

Mr. Borawick: Your Honor, questions have been asked the Plaintiff on cross-examination regarding the attempts that he made to discover what had happened to this bond, and this is one of the letters sent to the Immigration and Naturalization people regarding it following the notification of the breach.

(Testimony of James P. Sanderson.)

I believe that is admissible under [20] those circumstances. The Defendant brought it up.

The Court: What is the foundation desired—as to the original?

Mr. Broz: No, your Honor, I was requesting a foundation as to the relevancy of the letter. It may be that Counsel's position is well taken. If I may examine it again, the Government may wish to withdraw its objection.

(Whereupon, proposed exhibit was handed to Counsel for Defendant.)

(Whereupon, there was a brief pause.)

Mr. Broz: The Government will withdraw its objection, your Honor.

The Court: All right. That is Exhibit Number 6, is it?

Mr. Borawick: Yes, your Honor.

The Court: Plaintiff's Exhibit Number 6 may be admitted.

(Plaintiff's Exhibit 6 admitted.)

PLAINTIFF'S EXHIBIT No. 6

September 26, 1952.

Commissioner of Immigration & Naturalization,
Washington, D. C.

Dear Sir:

Re: Eng Kam, A-7054617-T, May 6, 1952.

During the first few months of this year there was correspondence between the District Director at San Francisco and the Central Office concerning the

(Testimony of James P. Sanderson.)

intention to forfeit the $1000 bond deposited with the District Director at Seattle. My brief in opposition is dated April 2, 1952.

Subsequently to the above Eng Kam was apprehended in Eastern Washington with instructions that he be taken to San Francisco for deportation, the port of arrival. Upon arrival at Seattle en route to San Francisco a writ of habeas corpus was issued by the United States District Court. At the trial the Service was represented by John Keane, an attorney in the employ of the Immigration Service.

On June 9, 1952, the Court held that the hearing accorded Eng Kam at San Francisco was unfair, granted the petition, and directed that the Immigration Service conduct a fair hearing at Seattle, and further:

"Ordered, Adjudged and Decreed that petitioner shall be released immediately upon the One Thousand Dollar ($1,000.00) bond now on deposit."

Pursuant to the Service instructions it is presumed that the local Immigration Office promptly advised the Central Office and forwarded copy of the Order.

A Board of Special Inquiry heard the case in July and directed exclusion. Appeal dated July 21, 1952, accompanied the record to Washington where it is now pending before the Board of Immigration Appeals.

Since the movement had been set last spring to forfeit the bond, the matter took a new status—a

(Testimony of James P. Sanderson.)

Court litigation—which the Central Office is by law obliged to notice and respect.

It is significant that the Court held that the Immigration officers at San Francisco as well as the Board of Immigration Appeals had acted unfairly, violated the law and regulations and Court decisions in excluding the petitioner; directed that a new hearing be given by the Immigration officers, and that the $1000 bond was then good and ordered that the petitioner be released under the same pending the final determination of the Court action; that the petitioner is now legally at large under said bond.

It is believed that the forfeiture of the bond at this stage is premature and wrong and that such course should not have been taken until the petitioner's remedies are exhausted. It is therefor requested that the bond be reinstated.

Under date of April 12, 1952, you were advised that Eng Kam was apprehended and was in the custody of the District Director at Seattle pending the outcome of habeas corpus proceedings with the information that the bond should not be forfeited provided the Court holds that the hearing at San Francisco is unfair.

Yours truly,

/s/ J. P. SANDERSON.

Admitted in evidence October 6, 1955.

(Testimony of James P. Sanderson.)

Q. (By Mr. Borawick): I show you what has been marked for identification as Plaintiff's Exhibit Number 7, Mr. Sanderson. Do you recognize that? A. I do. [21]

Q. What is it, sir?

A. It is a copy of a letter addressed to the Commissioner of Immigration of June 9, 1953, advising that Eng Kam had been found admissible to the United States by the Board of Immigration Appeals, and requests an answer.

Mr. Borawick: I offer this as Plaintiff's Exhibit 7. I think the foundation is laid for the same reason.

Mr. Broz: No objection.

The Court: Exhibit 7 may be admitted.

(Plaintiff's Exhibit 7 admitted.)

PLAINTIFF'S EXHIBIT No. 7

June 9, 1953.

Commissioner of Immigration and Naturalization,
Washington, D. C.

Dear Sir:

Re: Eng Kam, A-7054617, Nov. 18, 1952.

Your letter states that the Board of Immigration Appeals is being requested to forward the subject's file to your office after action has been completed,

(Testimony of James P. Sanderson.)

and upon receipt I will be advised concerning the bond matter.

Please refer to my letter of April 29, 1953, advising that the BIA had on April 21, 1953, that the subject was found admissible under the Act of December 28, 1945, as amended, and requested that the bond be returned.

No communication has been received from the Central Office in regard to this matter since receiving the letter of November 18, 1952.

At present I am at a loss to know whether this matter has been overlooked or whether it is to be ignored.

From an equitable point of view it is only reasonable that my request be answered.

Yours truly,

/s/ J. P. SANDERSON.

Admitted in evidence October 6, 1955.

Mr. Borawick: I have no further questions, your Honor.

Mr. Broz: No further questions, your Honor.

The Court: That is all, Mr. Sanderson.

(Witness excused.)

Mr. Borawick: The Plaintiff rests, may it please the Court.

Mr. Broz: The Government rests, your Honor.

The Court: All right, you may proceed with argument. I take it that the Government's [22] position is that the Plaintiff has not made a case, is that correct?

Mr. Broz: Yes, your Honor.

The Court: All right.

Mr. Borawick: May it please the Court?

The Court: I am just going to finish reading this, Mr. Borawick, and then you may proceed. I have not finished reading this last letter.

Mr. Borawick: I am sorry.

(Whereupon, there was a brief pause.)

The Court: All right, you may proceed.

(Whereupon, closing argument was made for and on behalf of the Plaintiff by Mr. Borawick and closing argument was made for and on behalf of the Defendant by Mr. Broz, and the following proceedings were then had, to wit:)

The Court: Court is now recessed until two o'clock this afternoon.

(Whereupon, at 11:23 o'clock a.m., a recess was had in the within-entitled and numbered cause until 2:00 o'clock p.m., October 6, 1955, at which time, Counsel heretofore noted being present, the following proceedings were had, to wit:)

The Court: In the case on trial in which [23] I indicated I would give a decision after the noon re-

cess, I have reviewed the authorities and evidence again and the matter presents a provoking question, so far as I am concerned at least.

There appears to be no doubt but what there must be applied the rule of strict construction in construing the obligation of the bond here involved.

Condition number (2) of the bond I find to be the applicable provision. It reads as follows:

"(2) If, in case the said alien, upon such hearing or hearings, is found to be unlawfully within the United States and is for any reason released from custody pending issuance of a warrant of deportation or after said warrant has been issued and pending final deportation, the above-bounden obligors, or either of them, shall cause the said alien to be delivered at San Francisco, California, into the actual custody of an officer of the United States Immigration and Naturalization Service, upon and pursuant to the request of said officer or of any other officer of the United States Immigration and Naturalization Service, for deportation under the aforesaid warrant of deportation, and said alien is accepted by such officer, then this obligation * * *" is "void." [24]

Now, what we have here is a surety bond given to assure the deliverance of this individual Eng Kam for deportation when it has been finally determined that he is to be deported.

If there had been action declaring the bond breached shortly after Eng Kam failed to appear as demanded in November, 1950, and the forfeiture ordered substantially before Eng Kam was appre-

hended, there would be a serious question whether Plaintiff could recover. However, there was no action taken until about the time that he was apprehended and time for appeal had not expired until after apprehension. Then a petition for a writ of habeas corpus was filed, the ultimate result of which was a finding that the hearing and order of deportation thereunder was unlawful. Thereafter, upon further hearing and appeal, the Department itself found that Eng Kam was entitled to stay in this Country. It thus appears that the demand for his appearance for deportation, which was the basis of the declared breach, was unlawful.

It must be held under a rule of strict interpretation therefore that there was no lawful requirement that Eng Kam be presented for deportation. The failure to do that which was ultimately [25] found not required cannot be a ground for concluding that there has been a breach of bond subjecting the obligor, in this case Mr. Sanderson, to a forfeiture of the one thousand dollar ($1,000.00) Government bond.

I recognize, as I indicated this morning, that for the obligor here, Mr. Sanderson, to fail to produce the principal in this case, Eng Kam, because he thought the hearing was not valid, perhaps would not be a sufficient reason in and of itself to justify his refusing to produce Eng Kam if demanded. I gather from the evidence Mr. Sanderson didn't know where Eng Kam was so that he couldn't have produced him in any event prior to his apprehension

by the immigration authorities. Nevertheless, the purpose of the bond here is to assure the Service that the person being released from custody will be available when and if it should be detemined that he is to be deported. That is the underlying purpose of the bond and, with that thought in mind, and bearing in mind the strict construction required, I am of the opinion that there has not been, in view of the circumstances that have developed in this case, a breach that would entitle the Government to retain the bond or proceeds [26] thereof which, in effect, have been forfeited as a result of the Government's action herein.

In other words, I have come to the conclusion, after the noon hour, that recovery should be granted as prayed for.

The original hearings and any orders resulting therefrom were invalid as decided in the habeas corpus proceedings. Consequently, any appearance of Kam for deportation, as demanded by the immigration authorities, could not be construed as a lawful requirement or condition of the contract.

The Court recognizes the administrative difficulties that confront the Immigration and Naturalization Department if one similarly situated should just decide he wasn't going to produce a person because he felt that the hearing was invalid. This, however, does not change the law. So, that is the Court's ruling.

Judgment will be for the Plaintiff.

Does that give you sufficient to make your proposed findings?

Mr. Borawick: I believe so, your Honor.

The Court: Under the case in 33 Federal 2nd, I think the finding might be made the [27] other way. All in all, I believe that the equities of the situation do require the decision that the Court has just announced.

Anything further? How much time do you want to present these findings?

(Whereupon, there was a brief pause.)

The Court: I will give you two weeks; make it the 24th.

(Whereupon, hearing in the within-entitled and numbered cause was concluded.) [28]

Reporter's Certificate

I, Earl V. Halvorson, Official Court Reporter for the United States District Court, Eastern and Western Districts of Washington, do hereby certify that the foregoing is a full, true and correct transcript of proceedings hereinbefore set forth; that any omissions from a complete transcript of proceedings had have been parenthetically noted herein; and I do further certify that the foregoing transcript has been transcribed by me or under my direction.

/s/ EARL V. HALVORSON,

[Endorsed]: Filed January 12th, 1956. [29]

DEFENDANTS EXHIBIT No. 1

Form I-353.
United States Department of Justice
Immigration and Naturalization Service
(Rev. 9-1-47)

Bond Conditioned for the Delivery of an Alien

(Note: Instructions on Form 1-308 Should Be Strictly followed in Preparing This Bond.)

(Name of alien): Eng Kam.

Seattle, Washington,
November 5, 1948

Examined and Approved as to Legal Form and Execution and Accepted.

/s/ R. S. GORHAM,
Immigration and Naturalization Officer in Charge.
District Director, Seattle District.

Know All Men by These Presents:

That we, Jas. P. Sanderson, residing at Second Avenue & Cherry Bldg., Seattle, Washington, are held and firmly bound unto the United States of America, in the full and just sum of One Thousand and no/100 Dollars ($1,000.00), as liquidated damages and not as a penalty, to be paid to the United States, for which payment well and truly to be made, without relief from valuation or appraisement laws, we, and each of us, do bind ourselves, our heirs, executors, administrators, successors, and

assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 5th day of November, 1948.

Whereas, Eng Kam, an alien, aged.....years, a native of China, who arrived at the port of San Francisco, California, per "General Meigs" on the 9th day of September, 1948, has applied for admission to the United States.

And Whereas, the said alien, pending the final disposal of his case, has applied to an immigration and naturalization officer of the United States for his release from custody upon giving a proper bond or undertaking in accordance with Section 20 of the Immigration Act of 1917 (39 Stat. 890), that he will deliver himself at San Francisco, California, into the custody of the same officer or some other officer of the United States Immigration and Naturalization Service for hearing or hearings and/or for deportation in case he is found to be unlawfully within the United States;

Now, Therefore, the conditions of this obligation are such that (1) in case said alien is released from custody, if the above-bounden obligors, or either of them, shall cause the said alien to be delivered over to an officer of the United States Immigration and Naturalization Service, at San Francisco, California upon and pursuant to the request of said officer or of any other officer of the United States Immigration and Naturalization Service for a hearing

or hearings, and further, notwithstanding any delivery of the said alien for hearing or hearings pursuant to the foregoing conditions, (2) if, in case the said alien, upon such hearing or hearings, is found to be unlawfully within the United States and is for any reason released from custody pending issuance of a warrant of deportation or after said warrant has been issued and pending final deportation, the above-bounden obligors, or either of them, shall cause the said alien to be delivered at San Francisco, California, into the actual physical custody of an officer of the United States Immigration and Naturalization Service, upon and pursuant to the request of said officer or of any other officer of the United States Immigration and Naturalization Service, for deportation under the aforesaid warrant of deportation, and said alien is accepted by such officer, then this obligation to be void: otherwise to remain in full force and virtue: Provided, that it is hereby specifically convenanted and agreed by the above-bounden obligors, and each of them, that no order issued by or under the authority of the Attorney General by virtue of which the said alien is or may be granted additional time to appear for hearing or hearings, or by virtue of which issuance or execution of a warrant of deportation is or may be deferred, or by virtue of which the said alien is or may be permitted to depart voluntarily from the United States, shall be in any manner construed to impair or render void this obligation or any part thereof.

Line 14 beginning with "has been" deleted; lines 15, 16 and 17 deleted and in Line 17 "has applied for admission to the United States" inserted; lines 21, 26 and 33 "at San Francisco, California," inserted; line 28 beginning with "in regard" and ending with "custody" deleted; all prior to final execution of this bond.

[Seal] /s/ JAS. P. SANDERSON.

Signed and sealed in the presence of—

Name: Veryl G. Toms,

Address: 815 Airport Way, Seattle, Wash.

Name: Amy Rice,

Address: 815 Airport Way, Seattle, Wash.

For Use When United States Bonds or Notes Are Deposited as Security

The United States bonds/notes described in the annexed schedule are hereby pledged as security for the performance and fulfillment of the foregoing undertaking in accordance with Section 1126 of the Revenue Act of 1926, approved February 26, 1926, as amended (6 U.S.C. 15), and Treasury Department Circular 154 (revised), dated February 6, 1935, (31 CFR Part 225).

/s/ JAS. P. SANDERSON.

Title of bonds/notes: United States Treasury Bond of 1967-72.

Coupons attached: 49 coupons (numbered 6 to 54, inclusive).

Face value: $1,000.

Interest rate: 2½%.

Serial No.: 556845E.

Interest dates: Dec. 15, 1948, to Dec. 15, 1972.

DEFENDANT'S EXHIBIT No. 2

Form I-302
U. S. Department of Justice
Immigration and Naturalization Service
(Rev. 5-1-44)

POWER OF ATTORNEY

(For individual. To be securely attached to original bond)

Know All Men by These Presents, that I, the undersigned, of Seattle, Washington, do hereby constitute and appoint the Attorney General, and his successors in office, as my attorney, for me and in my name to collect or to sell, assign, and transfer certain United States bonds or notes, described as follows:

Title of Bonds/Notes: United States Treasury Bond of 1967-72.

Coupon or Registered: 49 coupons (numbered 6 to 54, inclusive).

Total Face Amount: $1,000.

Denomination: 2½%.

Serial Number: 556845E.

Interest Dates: Dec. 15, 1948, to Dec. 15, 1972.

Such bonds/notes having been deposited by me as security for the faithful performance of any and all of the conditions or stipulations of a certain bond, entered into by me with the United States, dated November 5, 1948, and made a part hereof, on behalf of Eng Kam. . . .years of age, native of China, and I agree that, in case of any default in the performance of any of the conditions and stipulations of such undertaking, my said attorney shall have full power to collect said bonds/notes or any part thereof, or to sell, assign, and transfer said bonds/notes or any part thereof, without notice, at public or private sale, free from any equity of redemption and without appraisment or valuation, notice and right to redeem being waived, and to apply the proceeds of such collection, sale assignment, or transfer, in whole or in part to the satisfaction of any damages, demands, or deficiency arising by reason of such default, as my said attorney may deem best.

And I hereby for myself, my heirs, executors, administrators, and assigns, ratify and confirm whatever my said attorney shall do by virtue of these presents.

In Witness Whereof, I have hereunto set my hand and seal this, the 5th day of November, 1948.

[Seal] /s/ JAS. P. SANDERSON.

Before me, the undersigned, a notary, public within and for the county of King, in the State of Washington, (or the District of Columbia), personally appeared the above-named Jas. P. Sanderson and acknowledged the execution of the foregoing power of attorney.

Witness my hand and notarial seal this 5th day of November, 1948.

[Seal] CLARE BALL,
Notary Public.

My Commission expires May 5, 1951.

DEFENDANT'S EXHIBIT No. 3

In the District Court of the United States for the Western District of Washington, Northern Division

Number 3045

In the Matter of

The Petition of ENG KAM, for Writ of Habeas Corpus.

Transcript of portion of proceedings relating to bond in the above-entitled and numbered cause, had on the 9th day of June, 1952, at Seattle, Wash-

ington, before the Hon. William J. Lindberg, a United States District Judge.

Appearances:

EDWARDS E. MERGES,
Appeared for and on Behalf of the Petitioner; and

JOHN W. KEANE,
Immigration and Naturalization Service,
Appeared for and on Behalf of the Respondent.

Whereupon, the following proceedings were had, to wit:

PROCEEDINGS

(Whereupon, the Court having given his oral decision, and argument having been had on the subject of Petitioner's bond, the following proceedings were had, to wit:)

The Court: Well, it seems to me they have one thousand dollars of this boy's money and if it belongs to the Government they will get it and have it. In the meantime I think it is sufficient to guarantee his appearance.

Mr. Keane: Do I understand that the Court's order runs to—in other words, the collateral now on deposit in the Federal Reserve Bank cannot be touched by the Attorney General as liquidated damages?

The Court: This doesn't release it. It says, "Petitioner shall be released immediately upon the one thousand dollars now on deposit."

Mr. Keane: It makes no disposition of the bond?

The Court: No. I don't want to disturb any rights the Government may have or the Petitioner may have.

Mr. Merges: That doesn't disturb any right.

The Court: Do you understand that?

Mr. Keane: That is the only question.

The Court: You have seen the order?

Mr. Keane: Yes, your Honor.

(Whereupon, hearing was concluded.) [2*]

Reporter's Certificate

I, Earl V. Halvorson, official court reporter for the within-entitled court, hereby certify that the foregoing is a true and correct extract of proceedings in the within-entitled and numbered cause as set forth and that the same has been transcribed by me or under my direction.

/s/ EARL V. HALVORSON.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Wash-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

ington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(1) of the Federal Rules of Civil Procedure, and designation of counsel, I am transmitting herewith the following original documents in the file dealing with the action, including exhibits, as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers and documents being identified as follows:

1. Complaint, filed Apr. 25, 1955.
2. Summons with Marshal's return thereon, filed 4/28/55.
3. Answer, filed June 30, 1955.
4. Plaintiff's Trial Memoranda, filed 9/29/55.
5. Defendant's Trial Brief, filed Oct. 4, 1955.
6. Pretrial Order, filed Oct. 6, 1955.

Proposed Findings of Fact and Conclusions of Law by Plaintiff, lodged Oct. 17, 1955.

Judgment, lodged by Plaintiff Oct. 17, 1955, as proposed.

7. Notice of Presentation of proposed Findings and Judgment, filed Oct. 17, 1955.
8. Findings of Fact and Conclusions of Law, as signed and filed Oct. 19, 1955.
9. Judgment, as signed and filed Oct. 19, 1955.
10. Cost Bill, filed Oct. 19, 1955.
11. Notice of Appeal, filed Dec. 16, 1955.
12. Motion to Extend Time for Filing Record on Appeal, and Docketing, filed Jan. 3, 1956.

13. Notice of Motion to Extend Time for Filing Record, filed 1/3/56.

14. Order Extending Time for Filing Record and Docketing Appeal to March 15, 1956.

15. Court Reporter's Copy of Transcript of Testimony of Plaintiff, and Decision of the Court, filed Jan. 12, 1956.

16. Defendant's Designation of Record on Appeal, filed 2/20/56.

17. Order Directing Transmission of Original Exhibits, filed 2/27/56.

Plaintiff's Exhibits numbered 1 to 7 inclusive, and

Defendant's Exhibit A-1.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by appellant for preparation of the record on appeal herein, to wit:

Filing fee, notice of appeal, $5.00, and that said amount has not been paid to me for the reason that the appeal herein is being prosecuted by the United States of America.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 27th day of February, 1956.

[Seal] MILLARD P. THOMAS,
Clerk;

By /s/ TRUMAN EGGER,
Chief Deputy.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO SUPPLEMENTAL RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of the order of court directing transmission of original exhibits I am transmitting herewith as part of the record on appeal in this cause, and supplemental to the record as sent up, the following additional exhibits as referred to in the pretrial order in said cause, to wit:

Defendant's Exhibit No. 1, Bond for Delivery of Alien.

Defendant's Exhibit No. 2, Power of Attorney, Sanderson to Attorney General.

Defendant's Exhibit No. 3, Court Reporter's Transcript of portion of proceedings relating to bond, after Court's oral decision, in Cause No. 3045, in re Eng Kam, on June 9, 1952.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said Court at Seattle this 28th day of February, 1956.

[Seal] MILLARD P. THOMAS,
Clerk;

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 15050. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. James P. Sanderson, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed February 29, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15050

UNITED STATES OF AMERICA,

Appellant,

vs.

JAMES P. SANDERSON,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY

Appellant intends to rely upon the following points on the appeal of the above-captioned case to the Court of Appeals for the Ninth Circuit:

1. The District Court erred in ruling that the conditions of the Immigration bond were not breached when plaintiff failed to produce the alien for deportation upon due notice and demand by Immigration and Naturalization Service officials.

2. The District Court erred in ruling that a habeas corpus order excused retroactively the breach of the bond for failure to produce the alien on due demand and notice where the order was issued subsequent to the failure to appear on the ground that the hearing which led to the deportation order was procedurally improper.

3. The District Court erred in ruling that a second administrative determination, under which the

original final administrative determination was reversed and the alien was found to be admissible, retroactively obviated the necessity for the alien's appearance on the original order and excused the breach of the bond for failure to produce the alien on due demand and notice.

4. The District Court erred in granting judgment to plaintiff.

/s/ RICHARD F. BROZ,
Assistant United States Attorney, Attorney for Defendant (Appellant herein).

I hereby certify that I have personally mailed to M. L. Borawick, Box 867, Midway, Washington, Counsel for Appellee in this cause, a copy of this Statement of Points on Which Appellant Intends to Rely this 16th day of March, 1956.

[Seal] /s/ RICHARD F. BROZ.

Subscribed and sworn to before me this 16th day of March, 1956.

[Seal] /s/ LOIS M. STOLSEN,
Deputy Clerk, United States District Court, Western District of Washington, Northern Division.

[Endorsed]: Filed March 19, 1956.

No. 15050

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES P. SANDERSON, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR APPELLANT

GEORGE COCHRAN DOUB,
Assistant Attorney General,
JAMES P. MORIARTY,
United States Attorney,
PAUL A. SWEENEY,
RICHARD M. MARKUS,
Attorneys,
Department of Justice,
Washington 25, D.C.

INDEX

CITATIONS

Cases:

Cases—Continued

Acts:

In the United States Court of Appeals for the Ninth Circuit

No. 15050

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES P. SANDERSON, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered on October 19, 1955, by the District Court for the Western District of Washington, Northern Division, awarding appellee $1,000 plus interest at 4 per cent from the date of the judgment (R. 23). The suit was brought by appellee on April 26, 1955, to recover the proceeds of a United States Treasury Bond that had been deposited with the Immigration and Naturalization Service as security on an alien's immigration bond which was administratively found to have been breached. The District Court ruled that the bond was not breached, although the alien had failed to appear upon a final administrative order, because a habeas corpus order

issued two years later and subsequent administrative review required by that order eventually led to the alien's admission to the United States. The jurisdiction of the District Court was founded upon 28 U. S. C. 1346(a). This Court's jurisdiction is invoked under 28 U. S. C. 1291.

STATEMENT OF THE CASE

In the Fall of 1946, Eng Kam, a foreign-born alien, sought admission to the United States at the port of San Francisco without a passport or visa on the ground that he is the son of a veteran of the armed forces of the United States and was therefore admissible under the provisions of the Immigration Act then in force (P. L. 271, 59 Stat. 659, 8 U. S. C. 232 (1946), (R. 9). On October 26, 1946, the local Board of Special Inquiry of the Immigration and Naturalization Service found that he had not sustained his burden of proving the alleged relationship and therefore rejected his application for admission (R. 9, 17). Eng Kam, through his attorney, commenced an administrative appeal from the ruling by the Board of Special Inquiry, and pending that appeal Sanderson (Eng Kam's attorney) secured Eng Kam's release from custody by (1) executing a "Bond Conditioned for the Delivery of an Alien" (R. 59-62) which provided for $1,000 liquidated damages unless its terms were satisfied, and (2) posting as security on this bond the $1,000 United States Treasury Bond involved in this suit (R. 9-10, 16). The critical provisions of that immigration bond were these (R. 60-61):

> NOW, THEREFORE, the conditions of this obligation are such that * * * (2) if, in case the said alien, upon such hearing or hearings, is found to be un-

> lawfully within the United States and is for any reason released from custody pending issuance of a warrant of deportation or after said warrant has been issued and pending final deportation, the above-bounden obligors, or either of them, shall cause the said alien to be delivered at San Francisco, California, into the actual physical custody of an officer of the United States Immigration and Naturalization Service, upon and pursuant to the request of said officer or of any other officer of the United States Immigration and Naturalization Service, for deportation under the aforesaid warrant of deportation, and said alien is accepted by such officer, then this obligation to be void; otherwise to remain in full force and virtue. * * *

The alien's appeal to the Commissioner of Immigration and Naturalization was unsuccessful; the Commissioner affirmed the findings of fact and conclusions of law of the Board of Special Inquiry on January 10, 1949 (R. 10, 17). Then, as he was entitled to do under the applicable regulations, Eng Kam appealed to the Board of Immigration Appeals from the decision of the Commissioner. That Board, which represents the final administrative body empowered to review an exclusion order, affirmed the unanimous decisions of the Commissioner and the Board of Special Inquiry on July 1, 1949 (R. 10, 17). Thus, the administrative process for appeal had been exhausted. On October 19, 1950, the District Director of the Immigration and Naturalization Service made a demand upon appellee as an obligor on the immigration bond to produce the alien at the offices of the Immigration and Naturalization Service in San Francisco (R. 10, 17). The District Director's

order set the date by which the alien should be produced as November 15, 1950. However, appellee did not produce the alien at that time or at any subsequent time prior to his capture by representatives of the Immigration and Naturalization Service more than 16 months later (R. 10, 17). Shortly before the alien was recaptured by the Immigration Service, on March 5, 1952, appellee was advised by the Officer in Charge of Adjudications of the District Director's Office that the bond had been breached on November 15, 1950, and that he would recommend to the District Director that the security posted [redacted] be transferred to the United States Treasury unless within ten days appellee could show satisfactory reason why that security should not be forfeited (R. 10, 17, 43-44). Appellee filed no objection to the proposed forfeiture.[1] On March 25, 1952, the District Director ordered that the Treasury Bond be cashed on the ground that the Immigration Bond had been breached as of November 15, 1950, and that no satisfactory explanation had been given by appellee (R. 11, 18, 28-29). This ruling was subject to administrative appeal to the Commissioner within 10 days (see p. 5).

Three days later, on March 28, 1952, the alien was apprehended by the Immigration Service, and was held in Seattle for deportation (R. 17, 31). However, before he could be deported pursuant to the 1950 Order, Eng Kam instituted habeas corpus proceedings in the Federal District Court for the Western District of Washington (R. 11, 18). Those proceedings were

[1] Appellee testified that he did file a letter objecting to the forfeiture order (R. 45), but his testimony apparently refers to a letter appealing from the subsequent order of the District Director (R. 31).

begun on March 31, 1952 (R. 11) and on April 12, 1952, appellee notified the Commissioner of their pendency, urging that the previously ordered forfeiture of security should not be effected (R. 31). After acknowledging that notice on May 6, 1952 (R. 33), the Commissioner affirmed the District Director's order for the forfeiture of security on the Immigration Bond, on May 26, 1952 (R. 11, 19, 40).

The habeas corpus action was called for hearing on June 9, 1952. The district court ruled that the prior hearing had not been fairly conducted and that a writ of habeas corpus would issue unless a new hearing was afforded to Eng Kam within the next thirty days (R. 11, 18). Pending such a hearing, the court ordered that Eng Kam should be released on the security, if any, of the previously executed bond (R. 11). The court carefully noted, however, that its order was not intended to determine the status of the bond or the propriety of any administratively-ordered forfeiture (R. 66-67). A new hearing by the local Board of Special Inquiry was given Eng Kam on June 30, 1952 (R. 11, 18). As a result of that hearing, at which somewhat different evidence was presented, the Board reaffirmed its previous position by again ordering exclusion in a decision dated July 1, 1952 (R. 11, 18).

An administrative appeal was commenced from this new decision of the Board of Inquiry. Meanwhile, on September 24, 1952, the Federal Reserve Bank which was holding the Treasury bond, posted to secure the immigration bond, was advised by the Immigration Service to cash the bond and to credit the proceeds to the account of the United States, in accordance with the previous order declaring the bond breached (R.

11-12, 19). This transfer was accomplished on the next day, September 25, 1952 (R. 12, 19).

In the first administrative review of the new decision of the local Board of Inquiry the Commissioner again upheld the exclusion order. However, on April 21, 1953 (approximately seven months after the Treasury bond had been cashed and the proceeds transferred to the credit of the Government), the Board of Immigration Appeals reversed the two exclusion decisions and ordered that the alien be admitted (R. 12, 18). Two years later, on April 25, 1955, appellee brought this suit to recover the proceeds of the Treasury bond (R. 6) which had long since been declared forfeited and cashed by the Government.

In his complaint (R. 3-6), appellee alleged that officials of the Immigration Service "did wilfully, wrongfully and unlawfully declare the bond plaintiff had on deposit with defendant forfeited and did forfeit said bond." The Government's answer (R. 6-8) denied this and other allegations of the complaint and urged that appellee's complaint had not stated a ground upon which relief could be granted. At the conclusion of pre-trial proceedings, the district court issued a pre-trial order (R. 8-15) which set forth the mutually-admitted facts, admitted into evidence certain exhibits, and narrowed the issues and the contentions of the parties. Thereafter, trial was held at which the sole witness was appellee (R. 25-58).

At the conclusion of the trial, the district court entered Findings of Fact and Conclusions of Law (R. 15-22) and Judgment for appellee (R. 23) for $1,000 plus interest and costs on October 19, 1955. The United States filed a notice of appeal from that Judgment on December 16, 1955 (R. 24).

QUESTION PRESENTED

Whether security, posted to guarantee an alien's appearance for deportation upon order by the Immigration Service, was properly forfeited when the alien did not appear upon such an order and where he was recaptured only after extensive investigative work, even though subsequent judicial and administrative proceedings eventually led to the alien's admission to the United States.

SPECIFICATION OF ERRORS

1. The district court erred in ruling that the conditions of the immigration bond were not breached when plaintiff failed to produce the alien for deportation upon due notice and demand by Immigration and Naturalization Service officials.
2. The district court erred in ruling that a habeas corpus order excused retroactively the breach of the bond for failure to produce the alien on due demand and notice where the order was issued subsequent to the failure to appear on the ground that the hearing which led to the deportation order was procedurally improper.
3. The district court erred in ruling that a second administrative determination, under which the original final administrative determination was reversed and the alien was found to be admissible, retroactively obviated the necessity for the alien's appearance on the original order and excused the breach of the bond for failure to produce the alien on due demand and notice.
4. The district court erred in granting judgment to plaintiff.

ARGUMENT

Introduction and Summary

Under the terms of the bond agreement executed by appellee, the security posted by him was stated to be liquidated damages in the event that any of the conditions of that bond were not satisfied. The most fundamental condition of the bond was that which the Immigration Service ruled appellee breached, *viz,* upon determination that the alien is unlawfully in the United States and a request by an officer of the Service that the alien appear for deportation, appellee was obliged to deliver the alien into the physical custody of an officer of the Service at San Francisco. There is no dispute here that a final administrative order, from which no further appeal was available, was made that the alien here involved was not admissible to the United States and should therefore be deported. Nor is there any question that appellee was advised of this decision and was instructed to produce the alien for deportation on a date approximately one month after the notice. Furthermore, it is admitted that appellee did not produce the alien at that time or at any subsequent time; the Immigration Service obtained custody of the alien involved only after their own diligent efforts to recapture him over a period of almost two years.

Appellee relies, however, on the fact that certain subsequent events eventually led to the admission of the alien into the United States. In part A, *infra,* pp. 10-13, we show that appellee's failure to produce the alien was a proper basis for the forfeiture of the security posted; in part B, *infra,* pp. 13-19, we demonstrate that the subsequent events did not retroactively effect the legality

of the original deportation order or appellee's established liability on the immigration bond. The only subsequent events relevant to the condition of the bond breached by appellee were (1) the capture of the alien by the Immigration Service, (2) the habeas corpus order of the District Court based upon a determination that the original hearing was not fairly conducted, (3) the holding of a new hearing by the Immigration Service, and (4) the decision on the alien's last administrative appeal (from adverse rulings after the new hearing) that he should be permitted to enter the United States. We submit that none of these events detracted in any way from the legality of the deportation order when issued or relieved appellee of his liability which was fixed when he failed to obey that original order.

The irrelevance of events occurring, after the establishment of liability is shown by decisions interpreting other immigration bonds and by closely analogous rulings on criminal appearance bonds. Certainly, the eventual acquittal of one who has been released upon bail during criminal proceedings does not retroactively excuse any previous failure to appear in accordance with the terms of his bond. The only cases which are even inferentially contrary to this established principle concern instances where (1) the order to appear is so patently without legal basis at the time of its issuance that obedience is not required or where (2) subsequent legislation establishes a legislative intent to excuse retroactively disobedience of an order to appear as well as to eliminate retroactively the ground for detention which originally led to the posting of the bond. Not only do authorities postulating these two exceptions represent a highly questionable minority rule, but we

submit that neither of these situations has any application to the facts of this case.

Appellee's Failure to Produce the Alien Upon a Valid Request of the District Director of the Immigration Service, in Accordance With the Terms of His Bond, Finally Fixed His Liability.

A. *Appellee's Failure to Produce the Alien Upon a Valid Request of the District Director Was a Breach of the Bond for Which the Security Posted Was Properly Forfeited.*

It is clear from the language of an immigration bond that the undertaking of the obligor constitutes a promise by him that the terms of the bond will be fulfilled and that if the terms are not satisfied the security posted with the bond will be forfeited as liquidated damages for the breach. The Immigration and Naturalization Service need not release an alien from its custody pending administrative review of his application for admission. *United States ex rel. Kwong Hai Chew* v. *Colding, et al.,* 98 F. Supp. 717 (E.D.N.Y.); *United States ex rel. Soo Hoo Chew Yee* v. *Shaughnessy,* 104 F. Supp. 425 (S.D.N.Y.); cf. *Shaughnessy* v. *United States ex rel. Mezei,* 345 U.S. 206; *United States ex rel. Knauff* v. *Shaughnessy,* 338 U.S. 537. However, as a matter of practice, the Immigration Service does release aliens from its custody on some occasions and permits them to enter the United States temporarily during such administrative review, if their availability for hearings or deportation is guaranteed by the posting of sufficient security.

In this case, the alien involved was released in the United States, after the Board of Special Inquiry had determined that he should be excluded, pending ad-

ministrative appeals from that ruling to the Commissioner of Immigration and thereafter to the Board of Immigration Appeals (R. 9). His release was obtained only when his attorney, the appellee in this case, executed the form "Bond Conditioned for the Delivery of an Alien" (R. 59) and deposited a $1,000 Treasury Bond with a power of attorney to cash that Bond as security for the liquidated damages specified in the immigration bond (R. 63). By the terms of this contract, appellee agreed that the $1,000 Treasury Bond should be cashed by the Immigration Service and deposited to the account of the United States as damages *unless* (1) the alien appeared upon request for any hearing or hearings concerning his application for admission, *and unless* (2) the alien appeared upon request for deportation. We submit that the latter condition was plainly violated in the circumstances of this case. There can be no question that an authorized official of the Immigration Service did request appellee to produce the alien for deportation (R. 10, 17). Nor is there any doubt that appellee failed to comply with the request at the time specified in the District Director's notice to him or at any subsequent time (R. 10, 17). The plain terms of the bond, we submit, make it perfectly clear that appellee thereby failed to satisfy the conditions and forfeited his right to the security posted.

However, the district court interpreted the bond as requiring the alien to appear upon a request of the Immigration Service only after "it was finally and legally determined that he be deported" (R. 20). That construction of the bond incorporates new limitations on the terms of the agreement which wholly ignore their language and purpose. The first condition which had to be satisfied before the security was returnable

to appellee was that the alien appear upon a request by an officer of the Immigration Service for any hearing or hearings. Plainly a final legal determination of exclusion is not a requisite to the holding of a hearing. Nor does the language of the second condition (that which is primarily involved here) include the phrase inserted by the district court, for it provides that the security would be forfeited unless (after being found to be unlawfully in the United States by one or more hearing boards) the alien responds to a request by an officer of the Immigration Service to appear for deportation. There is no statement that the decision to deport him must be final or non-appealable or that it must comply with some external standard of legality. The purpose of the bond is obviously to give some assurance to the Service that it will not have to search for the alien when he is wanted for further administrative proceedings or action and to compensate the Service for expenses incurred if the alien does not appear voluntarily, whether or not the alien's admissibility status is finally determined at that time. That purpose would be defeated, or at least severely restricted, if the alien could be recalled only after it was "finally and legally determined that he be deported."

Moreover, even if the district court's construction of the bond were used, we submit that it is still apparent that the failure to comply with the request here involved was a breach of the bond. Appellee was not requested to produce the alien until more than a year had passed from the date of the decision by the Board of Immigration Appeals affirming the two lower administrative rulings of exclusion. The decision of the Board of Immigration Appeals was at that time established by statute as the final administrative determination in an

exclusion case. No additional deportation warrant is necessary in exclusion cases. Once an alien is in the custody of the Immigration Service after the Board of Immigration Appeals has affirmed an order for his exclusion, no further judicial or administrative act is necessary before he is deported. That decision was not reviewable by the courts, except by habeas corpus in cases where the administrative procedure was not conducted in the statutorily prescribed method. *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206. Certainly the possible availability of the extraordinary writ of habeas corpus does not deny the fact that a final order of exclusion was made in this case by the Board of Immigration Appeals. Likewise, we submit that a decision of the Board of Immigration Appeals is clearly a "legal" determination where, as here, the Board plainly had jurisdiction over the subject matter and the parties involved in the dispute. The fact that there remains a remote possibility that the administrative review process will begin anew after a habeas corpus order is no evidence that the determination is not a "legal ruling", just as a final determination of a district court having jurisdiction over the subject matter and the parties is a "legal" determination despite the potentiality of reversal upon appeal.

B. *The Subsequent Events Involved Here Did Not Retroactively Affect Appellee's Liability on the Bond Which Was Fixed When the Bond Was Breached.*

It is a familiar rule in cases dealing with immigration bonds, as well as criminal appearance bonds, that upon a breach of the terms the obligor becomes the absolute debtor for the amount of the damages or pen-

alty. The courts have repeatedly rejected any suggestion that subsequent developments or occurrences relieve the obligor of his liability once the bond has been breached. See *e.g., Matta* v. *Tillinghast,* 33 F. 2d 64 (C. A. 1); *Kavounas* v. *United States,* 89 F. Supp. 689 (C. Cls.). In the field of criminal appearance bonds, for example, the courts have found that the defendant's failure to appear in accordance with the terms of a bond is not excused because the prosecutor later filed a *nolle prosequi* plea (*Detroit Fidelity & Surety Co.* v. *United States,* 59 F. 2d 565 (C.A. 8); *United States* v. *Nordenholz,* 95 F. 2d 756 (C.A. 4)), because the indictment was later dismissed (*United States* v. *Capua,* 94 F. 2d 292 (C.A. 7); cf. *United States* v. *Mack,* 295 U.S. 480), because the defendant was later apprehended and surrendered by the surety (*United States* v. *Rosenfeld,* 109 F. 2d 908 (C.A. 8), certiorari denied *sub nom Ladinsky* v. *United States,* 310 U.S. 646; *United States* v. *Hickman,* 155 F. 2d 897 (C.A. 7), because the defendant was later acquitted on retrial (*People* v. *Scopas,* 178 N.Y.S. 291, 109 Misc. 180), or because a conviction is later reversed on appeal (*Mayesville* v. *MtCutcheon,* 205 S.C. 241, 31 S.E. 2d 390; cf. *United States ex rel. Eisler* v. *District Director,* 87 F. Supp. 627 (S.D.N.Y.)).

There, as here, the bond serves to deter attempts to escape from the law enforcement agency and to compensate for expenditures made in attempting to recapture, if that should prove necessary. If an alien and the obligor on his immigration bond were encouraged to ignore the terms of the bond when they believed that they could upset an exclusion order on later administrative review, with or without the assistance of a habeas corpus order, the bond would have little or no value in deterring escape. Moreover, such a rule would

mean that the obligor would be free from liability in the very situation in which the Immigration Service is entitled to compensation, *viz.*, where it must expend money and effort to recapture the alien who refuses to appear voluntarily. Even though an alien believes that he is entitled to further administrative review or that he is entitled to a court order calling for such further review, he should nevertheless comply with all proper requests by the Immigration Service to appear. While in the custody of the Service the alien can raise any substantive or procedural objections that he may have to rulings as to his status, without violating the terms of the bond in any way. However, if he flouts the terms of the bond, we submit that his obligor's liability for the breach is wholly unrelated to the success or failure of later attempts to reverse the substantive exclusion order. Under the rule suggested by appellee, the status of a bond would never be settled since there is always a possibility that some later developments will cause a reversal of the exclusion ruling upon which the custody and bond were premised. Indeed, even if after a breach of the bond the alien were recaptured and physically deported, it is still conceivable that upon a new application for admission and a new hearing the alien might be successful in showing that the first decision was erroneous and that he has always been entitled to admission. Such a construction of the bond, in light of its obvious purpose, is patently without merit. Cf. *Kavounas* v. *United States,* 89 F. Supp. 689 (C. Cls.).

The events in this case which occurred after the breach of the bond and which are conceivably relevant thereto are (1) the capture of the alien by the Immigration Service after approximately two years investigative efforts, (2) the habeas corpus order of the district

court calling for a new administrative hearing on the ground that the original hearing was not fairly conducted, (3) the holding of a new hearing by the Immigration Service which resulted in a new decision by the local Board of Special Inquiry that the alien was not admissible, and (4) the decision of the Board of Immigration Appeals on the alien's appeal (from two adverse administrative rulings based on the new hearing) that he was in fact admissible to the United States. Certainly the first of these occurrences does not strengthen appellee's position. It is firmly established by the courts that recapture of an alien released on bond or a criminal defendant released on bail is irrelevant to the obligor's liability for failure to produce the alien or defendant at the specified time and place. See, *e.g., Tennessee Bonding Co.* v. *United States,* 125 F. 2d 138 (C.A. 6). If that fact has any significance here, it is important only to show that this is an especially appropriate case for the payment of damages to compensate for investigative expenses.

The second event (*i.e.,* the habeas corpus order) also fails to support appellee's claim here since the court ruling on the application for habeas corpus did not purport to make any ruling as to the parties' rights on the bond agreement (R. 66-67), and since a decision that new hearings should be held does not detract from the fact that the alien did not appear on a previous occasion when he was instructed to do so by an authorized official of the Immigration Service. This development finds its parallel in criminal appearance bond cases in the situation where the convict "jumps bail" but a new trial is subsequently ordered by an appellate court. There, as here, the existence of further proceedings which could lead to either a favorable or unfavor-

able result does not excuse a past breach of the bond. Cf. *Southern Surety Co.* v. *United States*, 23 F. 2d 55 (C.A. 8), certiorari denied, 278 U.S. 604.

The third occurrence (*i.e.*, the holding of a new hearing) is significant only insofar as it shows that further consideration was being given to the alien's application for admission. As we noted above (p. 11) the alien was obliged to appear for intermediate hearings as well as upon a final order for deportation, so the fact that his case was being reconsidered does not show that his previous actions were consistent with the terms of the bond.

Finally, the fourth occurrence (*i.e.*, his eventual release from custody upon a reversal by the Board of Immigration Appeals), which is the primary basis for the district court's ruling, does not serve to justify the prior breach any more than the above enumerated subsequent developments. This event is comparable to the acquittal, the dismissal of an indictment, or the reversal on appeal which do not excuse prior wilful violations of a criminal appearance bond (see cases cited at p. 14). It is true that in this case the alien was eventually admitted to the United States, but it is also true that the Immigration Service had to search for him for two years when he refused to appear as ordered. We submit that if there is any difference between the rule applied in criminal bond cases and the rule applicable in immigration bond cases, it is that the discretion which rests with a district court in proceedings for the forfeiture of a criminal bond is absent in dealing with immigration bonds since the latter bonds are more properly contracts for liquidated damages rather than criminal penalties. See *Matta* v. *Tillinghast*, 33 F. 2d 64, 65 (C.A. 1). Therefore whatever discretion is applied in dealing

with liability on immigration bonds must be exercised by the Immigration Service itself, just as the discretion to forgive a breach of any other contract rests only with the aggrieved party thereto. In that light, we urge that the burden imposed upon appellee as an obligor on an immigration bond is at least as great, if not greater, than the burden which is carried by a surety on a criminal bail bond. Thus in this area, as in the field of criminal appearance bonds, an eventual substantive determination in favor of the party released from custody does not relieve his obligor from liability which attached when the person released refused to permit orderly procedure in the disposition of his case.

The few cases which even suggest that a subsequent occurrence may retroactively affect liability on a bond can be classified in two categories: (1) instances where the substantive basis for custody is retrospectively considered so patently spurious that there could be no obligation to return to custody despite the terms of a bail bond (*State* v. *Bryant,* 90 Wash. 20, 155 Pac. 420; *Leontas* v. *Walker,* 166 Ga. 266, 142 S.E. 891); and (2) cases in which subsequent legislation is interpreted to excuse retroactively not only the substantive basis for custody but any procedural violations of the terms of a release from custody (*United States* v. *Manufacturer Cas. Ins. Co.,* 113 F. Supp. 402 (S.D.N.Y.)). The former situation can be explained in contractual terms on the basis that the contract for release from custody was void for a total lack of consideration; in those cases the courts have ruled that there was no breach because there was no valid bond, rather than concluding that the later exoneration from criminal liability excused a

prior breach of the bond. The latter type of ruling is based upon the language of a particular act of the legislature. Both such doctrines represent a minority view which is subject to the very serious criticism that unless extreme care is used, violations of security bonds of this type will be encouraged among those who are willing to take a chance on their eventual success in the courts or the legislature. See *United States* v. *Du Faur*, 187 Fed. 812 (C.A. 7), certiorari denied, 223 U.S. 732; *Goldsby* v. *State*, 159 Tenn. 396, 19 S.W. 2d 241. In any event, neither of those situations has any application to the facts of this case so as to support the position taken by the district court.[2]

---

[2] In the court below appellee also argued that the Immigration Service had no right to forfeit the security posted to guarantee the performance of the terms of the immigration bond, relying upon decisions of this Court and other courts that the Immigration Service has no power to make a final non-reviewable decision as to a breach of the bond. *United States* v. *Western Surety Co.*, 118 F. 2d 703 (C.A. 9), *Kubara* v. *United States*, 89 F. 2d 965 (C.A. 3). The Government does not contend, however, that the decision of the Immigration Service was unreviewable in the courts. Rather we argue only that the Government, like any other party to a contract, has the right to determine that its contract with another has been broken and to retain any deposit or security given by that other party to guarantee performance. Although appellee has the right to bring this action against the United States, he cannot recover here, any more than he could recover against a private defendant, unless he can affirmatively show that he is entitled to a return of money deposited as security for the performance of his contractual promises. Cf. *Matta* v. *Tillinghast*, 33 F. 2d 64, 65 (C.A. 1). Or, from another viewpoint, it is certainly clear that appellee is not entitled to recover on the contract involved unless he can first satisfy his burden of showing that the contractual conditions precedent to the return of his security have been satisfied.

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment of the district court should be reversed and the case remanded with instructions to dismiss the action.

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No. 15050

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

JAMES P. SANDERSON,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

M. L. BORAWICK

WAYNE R. PARKER

Attorneys for Appellee

ADDRESS: U. S. POST OFFICE BUILDING
MIDWAY, WASHINGTON

BALLARD NEWS, SEATTLE, WASHINGTON — 7/26/56 — 45 COPIES

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SUBJECT INDEX

CITATIONS

CASES:

ACTS:

FEDERAL RULES OF PROCEDURE:

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HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

The Jurisdictional Statement of the Case as set forth in Appellant's brief, P. 1, 2, is correct.

STATEMENT OF THE CASE

The Statement of the Case as set forth in Appellant's brief, P. 2 to 7 is substantially correct, except

as modified by Note 1, P. 4 and phrase beginning with last words R. 18.

ARGUMENT ON THE MERITS

The Appellant concedes that Eng Kam, the alien subject of the bond, arrived at San Francisco, California, in the fall of 1946 and applied for admission to the United States as a son of a veteran of the armed forces of the United States and therefore qualified for admission if the relationship was bona fide under the provisions of the Immigration Act then in force described as P. L. 271, 59 Stat. 659, 8 U.S.C. 232, 1945; that on October 26, 1946 the Board of Special Inquiry of the Immigration and Naturalization Service found that he had not sustained his burden of proving the alleged claim of relationship and therefore rejected and denied his application for admission.

It was timely urged and contended through administrative appeals that the hearing accorded Eng Kam on his application was unfair. The administrative process for appeal was exhausted. Pending further proceedings Eng Kam was released under a $1,000 bond posted by Appellee.

It is evident that Eng Kam was entitled to his full rights as authorized by P. L. 271, supra, and certainly to a fair hearing.

The cardinal principle of statutory construction is to save and not to destroy. *United States* v. *Menasche*, 348 U.S. 528, 75 S.Ct. 513.

> "* * * * it has been distinctly recognized that administrative orders, quaisi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; * * *." *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Company*, 227 U.S. 88, 33 S.Ct. 186, 187, citing various alien and immigration cases.

The foregoing opinion is supported by *Gonzales* v. *United States*, 348 U.S. 407, 75 S.Ct. 409.

In reversing an order of deportation on the ground of an unfair hearing it was held in *Takeo* v. *Manney*, 9 Cir., 160 Fed. (2d) P. 667, that:

> "When, however, a hearing is had under a statute requiring a hearing, the hearing must conform to fair practices as they are known in Anglo-Saxon jurisprudence."

Eng Kam was apprehended by an agent of the Appellant on March 28, 1952, and temporarily detained in the Immigration Station at Seattle, Washington. He brought habeas corpus proceedings in the United States District Court for the Western District of Washington, Northern Division on March 31, 1952. At the trial on June 9, 1952 it was determined that Eng Kam had not received a fair hearing before the Board of Special Inquiry in 1948 and the court ordered

the Writ of Habeas Corpus granted unless a fair rehearing was given Eng Kam within 30 days (R. 18).

In accordance with the Court's order, Eng Kam was given a hearing by a Board of Special Inquiry at Seattle on June 30, 1952 and on July 1, 1952 the said Board ordered that he be excluded. On appeal to the Board of Immigration Appeals at Washington, D. C. the appeal was sustained on April 21, 1953 and Eng Kam was finally admitted to the United States pursuant to the provisions of Public Law 271. (R. 18). The Board of Immigration Appeals is the highest administrative authority having jurisdiction over the admission of aliens.

Eng Kam was apprehended by Appellant on March 28, 1952 and brought Habeas Corpus proceedings on March 31, 1952. On April 12, 1952 Appellee advised the Commissioner of Immigration and Naturalization at Washington, D. C. that Eng Kam was then held in the custody of the Appellant in the Immigration Station at Seattle pending habeas corpus proceedings; that it was alleged that the hearing before the service was unfair and that if the court so held that the bond should not be forfeited. (R. 31). Receipt of the said letter was acknowledged under date of May 6, 1952 with the information that same would be sent to the Appellant at Seattle. (R. 32). On May

26, 1952 the Commissioner ordered the bond breached (R. 19); that on September 24, 1952 the Federal Reserve Bank of San Francisco, with whom the bond was deposited, received advice from the Appellant at Seattle to the effect that the bond should be redeemed, or forfeited, which was done. Four coupons of the value of $50 was returned to Appellee. (R. 19). In view of the Commissioner's knowledge of the habeas corpus proceedings it would seem that the Appellant should have allowed the bond to remain in abeyance pending the decision.

The present Cause came on for trial on October 6, 1955. Some of the important points set forth in the Conclusions of Law are (R. 20-22):

> The conditions of the bond required that Eng Kam be delivered for deportation when it was finally and legally determined that he was to be deported. Par. II.
>
> That the hearing before the Board of Special Inquiry of 1948 which found Eng Kam inadmissible to the United States under Public Law 271 was unfair and improper and that the order of exclusion and deportation was improper. Par. III.
>
> That the Order of the District Director demanding that Eng Kam be surrendered for deportation was unlawful; that there was no lawful requirement or obligation to surrender Eng Kam for deportation at any time. Par. IV.
>
> That failure to deliver Eng Kam for deportation as against an unlawful and invalid order does not

constitute a breach of the conditions of the bond. Par. VII.

That there has been no breach in the bonding agreement which would entitle the Appellant to forfeit the bond.

That Eng Kam was found to be admissible under the provisions of Public Law 271 and Appellee is entitled to be exonerated as surety on the bond agreement. Par. IX.

The Judgment. It was adjudged and decreed that the Appellee have judgment against the Appellant in the sum of $1,000 with interest at the rate of 4 per cent from date of judgment, plus costs entitled by statute.

The Appellant has cited Federal civil and criminal cases, Immigration cases and State cases but it is extremely doubtful if any of them are in point in that the facts in no case are similar to the present case.

The decision of the District Court on questions of fact are final, unless clearly erroneous. Rules of Federal Procedure, Title 28, Rule 52a.

If Eng Kam was entitled to be released under bond, the Appellant was without authority to add restrictions not authorized by the law in general. The Appellant was without authority to administratively breach or forfeit a bond posted in behalf of an alien. *Kubara* v. *United States*, 3 Cir., 89 Fed. (2d) 965, followed by *United States* v. *Western Surety Co.*, 9 Cir., 118 Fed. (2d) 703, wherein the court said:

"The appellant claims that the order of the Assistant Secretary that the bond be declared breached is final and not reviewable except for failure to afford a fair hearing or manifest abuse of power. No statute or regulation conferring such adjudicating power on the department officials has been cited. We agree with the decision in *Kubara* v. *United States*, 3 Cir., 89 F. (2d) 965 that it does not exist."

The Appellant has recognized the foregoing decision but has not cited any acceptable authority to the contrary.

CONCLUSION

The very foundation of this proceeding is that the hearing accorded Eng Kam in 1948 was held by the District Court to be unfair and invalid. The Board of Immigration Appeals upheld the original exclusion order but on the second appeal ordered admission. If Eng Kam had been given a fair hearing in the first instance he would have been admitted and no bond would have been required, and the government would not have been put to any unnecessary expense. As the matter now stands the Government is endeavoring to profit through its own error. The judgment of the District Court is correct and should be affirmed.

Respectfully submitted.

M. L. BORAWICK
WAYNE R. PARKER
Attorneys for Appellee.

No. 15051

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SWIFT & COMPANY,

Respondent.

Transcript of Record

Petition for Enforcement of an Order of the National Labor Relations Board

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—5-23-56

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

APPEARANCES

MARCEL MALLET-PREVOST
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BAILEY LANG,
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San Francisco 4, Calif.,

For Respondent, Swift & Co.

United States of America
National Labor Relations Board

PETITION

When this Petition is filed by a labor organization or by an individual or group acting in its behalf, the Petition will not be processed unless the labor organization and any national or international of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

Case No.: 20-RC-2695.
Date Filed: 12/6/54.
Compliance Status Checked By: E. L.

Instructions.—

Submit an original and four (4) copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

If more space is required for any one item, attach additional sheets, numbering item accordingly.

Attachments Required.—

Except when this Petition is filed by an employer under section 9 (c) (1) (B) of the act, there must be submitted with the Petition proof of interest in the form of dated authorization or membership application cards, or other documentary evidence signed by employees, together with an alphabetical list of their names.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority:

1. Purpose of this Petition:

   RC—Certification of Representatives (Individual, Group, Labor Organization).—A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner, and Petitioner desires to be certified as representative of the employees for purposes of collective bargaining, pursuant to section 9 (a) and (c) of the act.

* * *

2. Name of Employer:
   Swift & Company.

   Employer Representative to Contact: Howard Thorne, Supt.
   Phone No.: PL 6-1500.

3. Address of Establishment Involved:
   East Grand Ave., South San Francisco, Calif.

4a. Type of Establishment (Factory, mine, Wholesaler, etc.):
   Slaughtering and Meat Packing.

4b. Identify Principal Product or Service:
   Meat Products.

5. Description of Unit Involved:
Included—Plant Clerks and Standard Checkers, excluding all Production employees, Supervisory employees, Office Clerical employees, Plant Protection Force, Steam, Power and Refrigeration employees, Mechanical and Maintenance gangs, Coopers and Truck Drivers.

6a. Number of Employees in Unit:
16.

6b. Is This Petition Supported by 30% or More of the Employees in the Unit?:
Yes.

(If you have checked box 1 A (RC) above, check and complete Either item 7a or 7b, whichever is applicable.)

7a. Request for recognition as Bargaining Representative was made on November 23, 1954, and Employer declined recognition on or about December 3, 1954.

* * *

11. Parties or Organizations Other Than Petitioner Which Have Claimed Recognition as Representatives, and Other Unions Interested in the Employees Described in Item 5 Above:
None.

* * *

12. If you have checked box 1 A (RC) above, list locals or other affiliates of Petitioner having or soliciting members among the employees in the

unit involved; or which will serve such employees in the event the Petitioner is certified as their representative. (If none, so state.)
None.

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA—A. F. of L. LOCAL 508,

By /s/ M. GUERRA,
Secretary-Treasurer.

Address:
4442 Third Street,
San Francisco 24, Calif.,
VAlencia 4-4451.

Willfully False Statement on This Petition Can Be Punished By Fine and Imprisonment. (U. S. Code, Title 18, Section 1001.)

Received in evidence as Board's Exhibit No. 1-A January 19, 1955.

United States of America
Before the National Labor Relations Board

Case No. 20-RC-2695

In the Matter of

SWIFT & COMPANY,

Employer,

and

LOCAL 508, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKKMEN OF NORTH AMERICA, AFL,

Petitioner.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the National Labor Relations Act.

2. The labor organization(s) named below claim(s) to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer, within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act:

> All plant clerks and standards checkers at the Employer's South San Francisco, California, plant, excluding all other employees, guards and supervisors as defined in the Act.[1]

Direction of Election

As part of the investigation to ascertain representatives for the purposes of collective bargaining

---

[1]The Petitioner seeks to represent a residual unit of 12 plant clerks and 5 standards checkers. The Employer requests dismissal of the petition upon the ground that the individuals sought to be represented are either confidential employees, managerial representatives, or supervisors.

The plant clerks work with foremen in plant department offices. They maintain department records pertaining to costs, production time spent by employees in production processes, and inventory. When necessary, they also compile data for use by the foremen in processing grievances. In addition, they tell employees where to place and when to move certain products in the course of processing, and they take charge of the department for short intervals when a foreman is absent. However, they have no power to hire or discharge or effectively

with the Employer, an election by secret ballot shall be conducted as early as possible, but not later than 30 days from the date of this Direction, under the direction and supervision of the Regional Director for the Region in which this case was heard, and subject to Section 102.61 and 102.62 of the National Labor Relations Board's Rules and Regulations, among the employees in the unit found appropriate in paragraph numbered 4, above, who were employed during the payroll period immediately preceding the date of this Direction of Election, including employees who did not work during said payroll period because they were ill or on vacation or temporarily laid off, and employees in the military

---

recommend such action, nor do they handle grievances. Their assignment of work is routine.

The standards checkers also perform most of their work in the plant department offices where they select and apply predetermined standards and variables to department production data to obtain a basis from which comptometer operators can compute incentive pay. Their figures are also used in connection with grievances involving incentive pay. The Employer's plant superintendent stated that their functions could not be defined as being supervisory.

On the basis of the above facts and the record as a whole, we find that the plant clerks and standards checkers are not confidential employees, members of management or supervisors. Wilson & Co., Inc., 97 NLRB 1388 at 1394; Foster Wheeler Corporation, 94 NLRB 211 at 212; Douglas Eaton Manufacturing Company, 110 NLRB No. 26 at 2. Accordingly, we find that the unit proposed by the Petitioner is appropriate and deny the Employer's request to dismiss the petition.

services of the United States who appear in person at the polls, but excluding those employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election, and also excluding employees on strike who are not entitled to reinstatement, to determine whether (or not) they desire to be represented, for purposes of collective bargaining, by:

Local 508, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL.

Dated: March 3, 1955.

GUY FARMER,
Chairman;

ABE MURDOCK,
Member;

IVAR H. PETERSON,
Member,

[Seal] NATIONAL LABOR RELATIONS BOARD.

[Title of Board and Cause.]

TALLY OF BALLOTS

Date issued: March 18, 1955.
Type of election: Board ordered.

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows:

1.	Approximate number of eligible voters	16
2.	Void ballots	0
3.	Votes cast for Petitioner	11
4.	Votes cast for	
5.	Votes cast for	
6.	Votes cast against participating labor organization	5
7.	Valid votes counted (sum of 3, 4, 5, and 6)	16
8.	Challenged ballots	0
9.	Valid votes counted plus challenged ballots (sum of 7 and 8)	16
10.	Challenges are not sufficient in number to affect the results of the election.	
11.	A majority of the valid votes has been cast for: Petitioner.	

For the Regional Director:

/s/ M. C. DEMPSTER.

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For Petitioner:

/s/ B. McCAFFREY.

For Company:

/s/ F. S. SIGLER.

[Title of Board and Cause.]

CERTIFICATION OF REPRESENTATIVES

An election having been conducted in the above matter by the undersigned Regional Director of the National Labor Relations Board pursuant to the Board's direction, and in accordance with the Rules and Regulations of the Board, and it appearing from the Tally of Ballots that a collective bargaining representative has been selected, and no objections having been filed by any of the parties within the time provided therefor.

Pursuant to the authority vested in the undersigned by the National Labor Relations Board,

> It Is Hereby Certified that Local 508, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL

has been designated and selected by a majority of the employees of the above-named Employer, in the unit heretofore found by the Board to be appropriate, as their representative for the purposes of collective bargaining, and that, pursuant to Section 9 (a) of the Act as amended, the said organization is the exclusive representative of all the employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

Signed at San Francisco, California on the 28th day of March, 1955.

On behalf of:

[Seal] NATIONAL LABOR
RELATIONS BOARD,

/s/ GERALD A. BROWN,
Regional Director for 20th Region, National Labor Relations Board.

[Title of Board and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between Swift & Company, by its officers and attorneys, herein called Respondent, Local 508, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, by its officers and attorneys, herein called the Union, and Robert V. Magor, Counsel for the General Counsel of the National Labor Relations Board, Twentieth Region, that:

I.

Upon a charge duly filed by the Union on the 13th day of June, 1955, and served on Respondent on the 14th day of June, 1955, receipt of which charge is hereby acknowledged by Respondent, the General Counsel of the National Labor Relations Board, on behalf of the National Labor Relations Board, herein called the Board, by the Regional Director for the Twentieth Region, herein called the Regional Director and the Regional Office, respectively, acting pursuant to authority granted in Sec-

tion 10(b) of the National Labor Relations Act, as amended, 29 U.S.C.A. 141, et seq., (Supp. July, 1947), herein called the Act, and pursuant to Section 102.15 of the Board's Rules and Regulations, issued a complaint and notice of hearing thereon, dated August 3, 1955, against the Respondent. True copies of the aforesaid charge, affidavit of service of said charge, complaint, and notice of hearing thereon were duly served by registered mail upon the Respondent and the Union. The parties hereto acknowledge service of such documents.

II.

a. Respondent is, and at times material herein, has been an Illinois corporation engaged in the slaughtering, handling, and dressing of livestock, and the sale of meat and related products, with its principal office in Chicago, Illinois, and branch plants and offices located throughout the United States. The only operation of Respondent involved herein is its meat packing plant at South San Francisco, California, herein called the South San Francisco plant.

b. During the twelve-month period ending December 31, 1954, Respondent purchased and received at its South San Francisco plant products and materials valued in excess of $10,000,000, of which amount approximately 56% was received directly in the flow of commerce from places and points located outside the State of California. During the same period above mentioned, Respondent sold its

products from its South San Francisco plant valued in excess of $10,000,000, of which amount approximately 20% was directly sold and shipped from the South San Francisco plant to places and points located outside the State of California.

III.

Local 508, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, referred to herein as the Union, is, and at all times material herein, has been, a labor organization within the meaning of Section 2(5) of the Act.

IV.

This stipulation, together with the charge, affidavit of service of the charge, complaint, notice of hearing, Respondent's answer, and the official reporter's transcripts in Swift & Company, Case No. 20-RC-2695, referred to in Paragraph VIII below, shall constitute the entire record herein and shall be filed with the Board.

V.

a. All parties hereto expressly waive hearing, the issuance of intermediate report and recommended order by a Trial Examiner, the filing of exceptions and oral argument before the Board, and expressly agree that the record as set forth in paragraph IV, above, may be submitted to the Board, and that on the basis thereof the Board may make findings of fact, conclusions of law, and issue an appropriate decision and order, which shall have

the same force and effect as if made after full hearing and presentation of evidence.

b. All the parties hereto further agree that immediately upon the execution of this stipulation the Regional Director shall file the record as described in paragraph IV, above, with the Board in Washington, D. C., and that each party hereto shall have twenty (20) days from the date of such filing to submit to the Board briefs in support of its respective position. Such briefs shall conform to the procedures set forth in the Rules and Regulations of the Board, Series 6, as amended, Sec. 102.46.

VI.

On December 6, 1954, pursuant to Section 9(a) and (c) of the Act, the Union filed with the Regional Office a Petition for Certification of Representatives for the below-mentioned unit of employees at the South San Francisco plant of the Respondent; said petition was docketed by the Regional Office as Case No. 20-RC-2695:

> Plant clerks and standards checkers, excluding all production employees, supervisory employees, office clerical employees, plant protection force, steam, power and refrigeration employees, mechanical and maintenance gangs, coopers and truck drivers.

VII.

On January 19, 1955, pursuant to appropriate notice, a hearing was held, pursuant to Section

9(c) of the Act, on the petition of the Union, in the matter of Swift & Company, Case No. 20-RC-2695, before a hearing officer of the Board, at San Francisco, California, at which time the Union and Respondent were present and gave testimony.

VIII.

It is hereby stipulated and agreed, by the parties hereto, that the official reporter's transcript of the hearing in the matter of Swift & Company, Case No. 20-RC-2695, and all exhibits introduced in said proceeding, described in paragraph VI, above, and filed with the Board, be made a part of the record in the present proceeding.

IX.

On March 3, 1955, the Board, acting pursuant to the provisions of Section 9 of the Act, issued its Decision and Direction of Election in the matter of Swift & Company, Case No. 20-RC-2695, in which it found the below-named unit of employees at Respondent's South San Francisco plant to be a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and did direct a secret ballot election among said employees:

> All plant clerks and standards checkers at the Employer's South San Francisco, California, plant, excluding all other employees, guards and supervisors as defined in the Act.

X.

On March 18, 1955, pursuant to the Board's Decision and Direction of Election, a secret ballot election was conducted by the Regional Office among the employees of Respondent at its South San Francisco plant, in the unit found appropriate by the Board, as described in paragraph IX, above, at which election a majority of the employees in said unit designated and selected the Union as their representative for the purposes of collective bargaining with Respondent. The results of said election were made known to Respondent on this date.

XI.

On March 28, 1955, the Regional Director, on behalf of the Board, acting pursuant to Section 9(a) of the Act, certified the Union as the exclusive representative of all the employees in the unit described in paragraph IX, above, at the South San Francisco plant of Respondent, for the purposes of collective bargaining with Respondent with respect to rates of pay, wages, hours of employment, and other conditions of employment.

XII.

On or about March 23, 1955, and at various times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive representative of all the employees in the appropriate unit described in paragraph IX, above, with respect to rates of pay, wages, hours of employment, and other conditions of employment. A true copy of a

letter dated March 23, 1955, from the Union to Respondent, is attached hereto and made a part hereof, and marked Appendix A.

XIII.

Since April 27, 1955, and at all times thereafter, to and including the date hereof, Respondent has refused to bargain collectively with the Union as the exclusive representative of all of the employees in the appropriate unit described in paragraph IX, above, with respect to rates of pay, wages, hours of employment, and other conditions of employment. A true copy of a letter dated April 27, 1955, from Respondent to the Union, stating Respondent's position, is attached hereto and made a part hereof, and marked Appendix B.

XIV.

This stipulation contains the entire agreement between the parties, there being no agreement of any kind, verbal or otherwise, which varies, alters or adds to this stipulation.

Signed this 16th day of August, 1955, at South San Francisco, Calif.

SWIFT & COMPANY,

By /s/ F. S. SIGLER,
Plant Supt.,
E. Grand Ave.,
So. San Francisco, Calif.

Signed this 18th day of August, 1955, at Chicago, Illinois.

LOCAL 508, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL,

By /s/ LESTER ASHER,
Attorney,
130 North Wells Street,
Chicago 6, Illinois.

Signed this 19th day of August, 1955, at San Francisco, California.

/s/ ROBERT V. MAGOR,
Counsel for General Counsel, National Labor Relations Board, Twentieth Region,
630 Sansome Street,
San Francisco 11, California.

(Copy)

Appendix A

March 23, 1955.

Mr. K. R. Richardson,
General Superintendent,
Swift & Company,
Union Stock Yards,
Chicago 9, Illinois.

Dear Mr. Richardson:

The plant clerks and standard checkers employed in your South San Francisco plant have selected

our Local 508 as the exclusive collective bargaining agent. The National Labor Relations Board will, undoubtedly, certify our Local Union in a few days.

Will you please furnish us with a complete list of job classifications and wage rates affecting this group. We should also like to have you furnish us with a payroll record indicating the basic weekly wage presently being paid to each of the employees within that bargaining unit. Also, please advise us what benefits are presently being enjoyed by this group which are different from those enjoyed by the production employees in the South San Francisco plant as provided for in our Master Agreement.

It is our present thought that a separate contract should be executed covering these employees, and that it should be separate and apart from the Master Agreement. However, we reserve advising you with any finality until we have received the information requested herein and have had an opportunity to discuss them with the representatives of this group.

Yours very truly,

RESEARCH DIRECTOR.

DD/a

(Copy)

Appendix B

April 27, 1955.

Mr. David Dolnick,
Director of Research,
Amalgamated Meat Cutters and Butcher Workmen
of North America,
2800 Sheridan Road,
Chicago 14, Illinois.

Dear Mr. Dolnick:

In reply to your letter of March 23, 1955:

Swift & Company has previously taken the position that the National Labor Relations Board should dismiss the petition filed by Local #508, AMC&BW-AFL, to represent the plant clerks and standards checkers at the Swift & Company, South San Francisco, California, plant. Our request to dismiss the petition was denied by the National Labor Relations Board. The Board thereupon directed that an election be conducted.

The Company is still of the opinion that the petition should have been dismissed. Accordingly, if Local #508, AMC&BW-AFL, decides to pursue the matter further, then it is our intention to plead at the first opportunity that the petition by Local #508 should have been dismissed.

The Company respecfully refuses to bargain with Local #508, AMC&BW-AFL, as the exclusive representative of the plant clerks and standards check-

ers at the Swift & Company, South San Francisco, California, plant.

Yours very truly,

SWIFT & COMPANY,

/s/ K. M. RICHARDSON, JBC.

Gen. Supt's. Ofc.
JLP:LS

Received August 19, 1955.

United States of America
Before the National Labor Relations Board

Case No. 20-CA-1110

SWIFT & COMPANY,

and

LOCAL 508, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL.

Decision and Order

Upon a charge duly filed on June 13, 1955, by Local 508, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, herein called the Union, the General Counsel of the National Labor Relations Board, herein called the General Counsel, by the Acting Regional Director for the Twentieth Region, issued a complaint dated August

3, 1955, against Swift & Company, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (5) and (1) and Section 2 (6) and (7) of the Act. Copies of the complaint, the charge and notice of hearing were duly served upon the Respondent and the Union.

With respect to the unfair labor practices, the complaint alleged in substance that since on or about April 27, 1955, the Respondent has refused to bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit for which the Union was certified as bargaining representative on March 28, 1955.[1] On or about August 10, 1955, the Respondent filed an answer to the complaint admitting the refusal to bargain, but contending that the petition in Case No. 20-RC-2695 should have been dismissed because the individuals sought to be represented by the Union did not constitute an appropriate unit.

Thereafter, on or about August 19, 1955, all parties entered into a stipulation setting forth an agreed statement of facts. The stipulation provides that the parties waive their rights to a hearing, to the issuance of a Trial Examiner's Intermediate Report and Recommended Order and to the filing

[1]An election was held on March 18, 1955, pursuant to the Board's Decision and Direction of Election in Swift & Company, 20-RC-2695, not reported in the printed volumes of Board Decisions.

of exceptions and oral argument before the Board. It also provides that the entire record in the proceeding shall consist of the stipulation, the charge, the complaint, the notice of hearing, the Respondent's answer, the affidavits and proof of service of the foregoing documents, and the official reporter's transcript in Swift & Company, Case No. 20-RC-2695, and all exhibits introduced in said proceeding. The stipulation further provides that, upon such stipulation and the record as therein provided, the Board may make findings of fact and conclusions of law, and may issue an appropriate Decision and Order which shall have the same force and effect as if made after full hearing and presentation of evidence.

The aforesaid stipulation is hereby approved and accepted and made a part of the record in this case. In accordance with Section 102.45 of National Labor Relations Board Rules and Regulations—Series 6, as amended, this proceeding was duly transferred to and continued before the Board.

Upon the basis of the aforesaid stipulation, the record and proceeding in Case No. 20-RC-2695, and the entire record in this case, the Board, having duly considered the briefs filed by the General Counsel and the Respondent, makes the following:

Findings of Fact

I. The Business of the Respondent

The Respondent, an Illinois corporation, is engaged in slaughtering, handling and dressing live-

stock, and selling of meat and related products, with its principal office in Chicago, Illinois, and branch plants and offices located throughout the United States. During the 1954 calendar year, the Respondent purchased and received at its plant in South San Francisco, California, which is alone involved herein, products valued in excess of $10,000,000, of which approximately 56 per cent was received directly from points outside the State of California. During the same period, the Respondent sold products from its South San Francisco plant valued in excess of $10,000,000, of which approximately 20 per cent was shipped directly to points outside the State. We find that the Respondent is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction in this case.

II. The Labor Organization Involved

Local 508, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, is a labor organization within the meaning of Section 2 (5) of the Act.

III. The Unfair Labor Practices

A. The appropriate unit and representation by the Union of a majority therein

We find that all plant clerks and standards checkers at the Employer's South San Francisco, California, plant, excluding all other employees, guards

and supervisors as defined in the Act, presently constitute, and have at all times since March 3, 1955,[2] constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

We also find that since March 18, 1955, on which date a majority of the employees in the appropriate unit designated the Union as their exclusive representative, the Union has been the representative of all employees in the unit for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.[3]

B. The Refusal to Bargain

The Respondent admits that on or about March 23, 1955, and at various times thereafter, the Union requested the Respondent to bargain collectively with it as the exclusive representative of employees in the appropriate unit with respect to rates of pay, wages, hours of employment and other conditions of employment; and that since April 27, 1955, the Respondent has refused to accede to such requests. The Respondent contends that it rightfully

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[2]On that date the Board issued its Decision and Direction of Election in Swift & Co., supra, finding the above-described unit to be appropriate.

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[3]On March 28, 1955, following the election, the Regional Director certified the Union as bargaining representative of employees in the aforesaid appropriate unit.

refused to bargain with the Union because the standards checkers and plant clerks are either supervisors, confidential employees or managerial representatives and therefore cannot constitute an appropriate unit. In the representation proceeding, the Respondent made the same contention as to the status of these individuals. The Board rejected the contention and found that the plant clerks and standards checkers were employees entitled to the protection of the Act. We perceive no reason for altering our determination in the representation proceeding that the individuals in dispute are not supervisors within the meaning of Section 2 (11) of the Act, or confidential employees,[4] or managerial representatives[5] as those terms are used by the Board. Nor do we perceive any incompatibility between the honest performance of duty by these plant clerks and standards checkers and membership in a labor organization.

In view of the foregoing, we find that by refusing on and after April 27, 1955, to bargain collectively with the Union, the certified bargaining representative of employees in the appropriate unit, the Respondent has violated Section 8 (a) (5) and (1) of the Act.

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[4]The Yale and Towne Mfg. Co., 112 NLRB No. 157; Continental Baking Co., 109 NLRB 33.

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[5]Bachmann Uxbridge Worsted Corp., 109 NLRB 868, 870; Chase Brass & Copper Co., Inc., 102 NLRB 62.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in Section III B, above, occurring in connection with the operations of the Respondent, as described in Section I, above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The Remedy

Having found that the Respondent violated Section 8 (a) (5) and (1) of the Act by refusing to bargain collectively with the Union as the exclusive representative of the employees in the above-described unit, we shall order the Respondent to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the above findings of fact, and upon the entire record in the case, the Board makes the following:

Conclusions of Law

1. Local 508, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, is a labor organization within the meaning of Section 2 (5) of the Act.

2. All plant clerks and standards checkers at the Employer's South San Francisco, California,

plant, excluding all other employees, guards and supervisors as defined in the Act, presently constitute, and at all times since March 3, 1955, have constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

3. Local 508, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, was on March 18, 1955, and at all times thereafter has been, the exclusive representative of the employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

4. By refusing on April 27, 1955, and at all times thereafter, to bargain collectively with the Union as the exclusive representative of the employees in the aforesaid appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

5. By said refusal to bargain, the Respondent has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Order

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local 508, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, as the exclusive representative of its employees in the appropriate unit;

(b) In any like or related manner interfering with the efforts of such representative of its employees to bargain collectively on their behalf.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Local 508, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, as the exclusive bargaining representative of its employees in the appropriate unit, with respect to rates of pay, wages, hours of employment and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement;

(b) Post at its plant in South San Francisco, California, where the employees in the appropriate unit are employed, copies of the notice, attached

hereto and marked "Appendix."[7] Copies of said notice to be furnished by the Regional Director for the Twentieth Region, shall after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by any other material;

(c) Notify the Regional Director for the Twentieth Region, in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., Nov. 10, 1955.

PHILIP RAY RODGERS,
Acting Chairman;

IVAR H. PETERSON,
Member;

BOYD LEEDOM,
Member;

[Seal] NATIONAL LABOR RELATIONS BOARD.

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[7]If this Order is enforced by a decree of a United States Court of Appeals, the notice shall be amended by substituting for the words "A Decision and Order" the words "A Decree of the United States Court of Appeals, Enforcing an Order."

Appendix

D-9532

Notice to All Employees
Pursuant to
A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will cease and desist from:

(a) Refusing to bargain collectively with Local 508, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, as the exclusive representative of our employees in the appropriate unit:

(b) In any like or related manner interfering with efforts of such representative of our employees to bargain collectively on their behalf.

We Will bargain collectively upon request with Local 508, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, as the exclusive representative of employees in the bargaining unit described herein with respect to rates of pay, wages, hours of employment, and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

The bargaining unit is:

All plant clerks and standards checkers at our South San Francisco, California, plant, ex-

cluding all other employees, guards and supervisors as defined in the Act.

SWIFT & COMPANY,
(Employer.)

Dated .....

By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Before the National Labor Relations Board
Twentieth Region
Case No. 20-RC-2695

In the matter of:

SWIFT & COMPANY,
Employer,
and
AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL No. 508, AFL,
Petitioner.

TRANSCRIPT OF PROCEEDINGS
Wednesday, January 19, 1955

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock, a.m.

Before: M. C Dempster, Hearing Officer.

Appearances:

CHARLES P. SCULLY,

Appearing on Behalf of Amalgamated Meat Cutters and Butcher Workmen of North America, Local 508, AFL, Petitioner.

DONALD H. BUSSMAN,

On Behalf of Swift & Company, Employer.

* * *

Hearing Officer: I will ask the reporter, for purposes of identification, to mark the documents as I state them.

First, the Original Petition in this case, docketed on December 6, 1954, as Board's Exhibit 1-A;

* * *

(Thereupon the documents above referred to were marked Board's Exhibits Nos. 1-A, 1-B, 1-C, 1-D, 1-E, for identification.) [5*]

Hearing Officer: Are there any objections to the receipt in evidence of these documents, Mr. Bussman?

Mr. Bussman: No objection.

Hearing Officer: Mr. Scully?

Mr. Scully: No objection.

Hearing Officer: There being no objections, Board's Exhibits 1-A through 1-E, inclusive, are hereby received in evidence.

(The documents heretofore marked Board's Exhibits Nos. 1-A to 1-E, inclusive, for identification, were received in evidence.)

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Hearing Officer: I now would like to suggest the commerce stipulation, which Mr. Bussman has looked at already.

Mr. Scully: It is agreeable with the Petitioner.

Hearing Officer: It is my understanding that the parties are ready to stipulate to the following statement:

"Swift & Company, herein called the Employer, is an Illinois Corporation, with its principal office in Chicago, Illinois, and branch plants and offices located throughout the United States.

"It is engaged in the slaughtering, handling, and dressing of livestock.

"Only the Employer's meat packing plant at South San Francisco, California, is involved in this proceeding.

"During the twelve months period, ending December 31, 1954, the Employer's purchases at its South San Francisco plant of [6] products and materials were in excess of $10,000,000, approximately 56% of which came from outside the State of California. During the same period, its sales of products from its South San Francisco plant were in excess of $10.000.000, approximately 20% of which it directly sold and shipped to points outside the State of California.

"The Employer and the Petitioner in this proceeding both concede the Employer's plant at South San Francisco, or its meat packing plant at South San Francisco, California, comes within the jurisdictional policies of the National Labor Relations Board."

Do you so stipulate, Mr. Scully?

Mr. Scully: So stipulate.

Hearing Officer: Mr. Bussman?

Mr. Bussman: So stipulate.

Hearing Officer: Off the record.

(Discussion off the record.)

Hearing Officer: On the record.

It is my understanding that the parties are ready to stipulate to the following statement:

"The Petitioner in this proceeding, namely, Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L., Local 508, affiliated with Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L., is a labor organization within the meaning of the National Labor Relations Act as amended." [7]

Do you so stipulate, Mr. Bussman?

Mr. Bussman: The Company so stipulates.

Hearing Officer: Mr. Scully?

Mr. Scully: So stipulate

Hearing Officer: Off the record.

(Discussion off the record.)

Hearing Officer: On the record.

As a result of an off-record discussion, it is my understanding the parties are ready to stipulate to the following statement:

"The Employer presently has a contract with the United Packing House Workers of America, C.I.O., which contains the following bargaining unit description: 'All employees in the boiler and engine room, including engineers, firemen, and expansion

men (temperature control men), auto mechanic (Helper), machinists, electricians, the scale repair man, oilers, the welder's helper, the tool room man, the blacksmith, carpenter, tinners, the bricklayer, pipe fitters, and painter; excluding all coopers and truck drivers and all production employees, elevator operators, laundry workers, janitors, the chief engineer and master mechanic, the assistant engineer and assistant mechanic, the supply man, the fire marshal, all clerical and office employees, the cooper supervisor, the auto mechanic supervisor, the carpenter foreman, the electrician foreman, and all other supervisory employees with authority to hire, promote, [8] discharge, discipline, and otherwise effect changes in the status of employees or effectively recommend such action.'

"The Employer, in addition, has a contract with the Petitioner in this case, which contract contains the following bargaining unit description, 'All production employees, excluding supervisory employees, clerical employees (plant and office), plant protection force, steam, power, and refrigeration employees, mechanical and maintenance gangs, coopers, and truck drivers.'

"The Employer also has a contract with the International Brotherhood of Electrical Workers, A.F.L., covering electricians.

"All of the above contracts, or units, have been certified by the National Labor Relations Board, and have been in existence for some years.

"In addition, the Employer has a contract with the International Brotherhood of Teamsters, Chauf-

feurs, Warehousemen, and Helpers of America, A.F.L, which covers drivers, and which contract has also been in force for a long number of years."

Do you so stipulate, Mr. Bussman?

Mr. Bussman: The Company so stipulates.

Hearing Officer: Mr. Scully?

Mr. Scully: So stipulated. [9]

* * *

FRANCIS STEWART SIGLER

a witness called by and on behalf of the Employer, being first duly sworn, was examined and testified as follows:

Direct Examination

Hearing Officer: Will you please spell out your full name for the record?

The Witness: Francis Stewart Sigler, S-t-e-w-a-r-t.

Hearing Officer: And your last name?

The Witness: S-i-g-l-e-r.

Hearing Officer: And your address?

The Witness: Business or home?

Hearing Officer: Business?

The Witness: South San Francisco, [11] California.

Hearing Officer: Care of Swift & Company, I take it?

The Witness: Care of Swift & Company.

Hearing Officer: You are employed by Swift & Company, are you not, Mr. Sigler?

The Witness: I am.

Hearing Officer: And what is your title?

(Testimony of Francis Stewart Sigler.)

The Witness: Plant Superintendent.

Hearing Officer: And approximately how long have you had that position?

The Witness: Since January 3, 1955.

Hearing Officer: And what position did you have before?

The Witness: Assistant Plant Superintendent.

Hearing Officer: And approximately how long was that, that you had that position?

The Witness: Twelve years.

Hearing Officer: Was that in South San Francisco also?

The Witness: That was in South San Francisco.

Hearing Officer: Would you please take your witness, Mr. Bussman?

Q. (By Mr. Bussman): Mr. Sigler, I am going to ask if you would please shout your answers to me, because we are quite a distance apart?

Could you tell us how many years you have been at the South San Francisco plant?

A. Twenty-eight. [12]

Q. Could you describe, generally, your duties and responsibilities as Superintendent?

A. I have the over-all responsibility for all production operations at the South San Francisco meat packing plant.

Q. Could you enumerate for us, specifically, what some of these duties and responsibilities consist of?

A. I have prepared a list of those responsibilities, and not necessarily in the order of their importance: the hiring of applicants for employment;

(Testimony of Francis Stewart Sigler.)

the selection and training for jobs; the instructing in regard to Company policies; the keeping of time records; the computation of earnings; computation of incentive earnings; the producing of labor standards to enable us to ascertain these premium earnings; administering labor agreements; the receipt of supplies, and checking and proper storing and handling of the same; receipt and handling of raw materials and the processing efficiently into finished products; the ascertaining of the manufacturing cost of producing these products, and the recording of the same; the recording of the disposal of all finished products; keeping the plant premises and equipment in order and repair and in proper sanitary condition; looking after the safety of the employees and the plant property; seeing that there is no pilferage or falsification of records; producing of steam power and refrigeration and the distribution of the same.

Q. Mr. Sigler, how many employees do you have at the South [13] San Francisco plant?

A. Approximately 750.

Q. Now those duties that you have just named, do you perform all of these duties yourself, personally? A. I do not.

Q. Could you give us some idea of what the structure of the operating end of the plant is?

A. It consists of many departments, each of whom is supervised by a foreman, who is assisted by his clerk.

Q. How many plant clerks do you have?

(Testimony of Francis Stewart Sigler.)

A. Twelve.

Q. Could you give us some idea of which of the duties, that you have named before, are performed by plant clerks?

A. I will give an outline of a clerk's duties. I will take a representative department, one in which I, myself, was the clerk at one time. That's our sweet pickle curing cellar.

A Clerk in that department keeps the time records; he weighs the product going into cure; makes out vat identity records; instructs the workmen to what portion of the cellar to truck the product to and put into cure.

Mr. Scully: May I interrupt? Could I have that last one back, Mr. Hearing Officer?

Hearing Officer: Would the reporter please read the previous stated duty?

(Part of answer read.) [14]

Q. (By Mr. Bussman): Do you wish to continue, Mr. Sigler, or is that all you have to say?

A. He enters on two stock record books, the quantity and the location of the product put into cure, curing ages, overhauling time schedules; makes out pulling data, which is a record of the day that the product is cured; hands overhauling cards to overhaul man; makes out supply records, showing quantities ordered, when received, amount used; assists in the taking of inventories of both product and supplies; accumulates sales data, that is the

(Testimony of Francis Stewart Sigler.)

daily shipping weights to various outlets; visually accompanies tierce overhaul man——

Hearing Officer: T-i-e-r-c-e?

The Witness: Yes, accompanies tierce overhaul man to visually assert that product is overhauled properly; makes out weekly stock reports showing quantities and ages of product; makes out monthly production record, which is a means of ascertaining yield, yields and gains.

Q. (By Mr. Bussman): Well, just to interrupt you here for a minute, could you give us an idea of what you mean when you said, "He accompanies the tierce overhaul man"?

A. This particular job is one that he actually instructs the overhaul men which tierce is to roll and how far. He actually instructs them, accompanies them and actually instructs them.

Q. Well, what is the purpose for moving the tierce?

A. It is to properly cure the meats which, if not overhauled [15] would lay together and not become properly cured. It actually stirs up the meat within the curing.

Q. Mr. Sigler, by way of simplification, would it be correct to say that this plant clerk's duties consist of keeping records pertaining to inventory?

A. Correct.

Q. Records pertaining to production, the amount of production? A. That is right.

Q. Records showing the volume of shipment out of the department? A. Correct.

(Testimony of Francis Stewart Sigler.)

Q. Records showing the transfer of products in and out of the department?

A. That is correct.

Q. Maintaining records which indicate the cost data which applies to a particular product?

A. That is right.

Q. Does the plant clerk keep records of the hours worked by the employees in the department?

A. He does.

Q. Would the plant clerk ever make out vacation slips for employees in the department?

A. He does.

Q. Could you tell us——

A. (Continuing): ——on many occasions. [16]

Q. Could you tell us what is meant by a vacation slip?

A. It is a slip that goes to the timekeeper and is the basis for payment of vacation money to the employee.

Q. If you, in your capacity as Superintendent, or anyone in the general office, wanted information pertaining to a particular department, who would furnish this information to you?

A. Restate that, please?

Q. If you, in your capacity as Superintendent, or anyone in the general office, wanted a record pertaining to a particular department, who would furnish that information, either to yourself or to them?

A. We would——

Q. (Continuing): ——or to your office?

(Testimony of Francis Stewart Sigler.)

A. We would phone the clerk for that information.

Q. He would prepare the report, is that correct?

A. That is correct.

Q. Mr. Sigler, where is the plant clerk's desk generally located?

A. It is either a double desk occupied jointly by the foreman and the clerk, or an adjacent desk within the same plant office.

Q. Let me ask you this? The facts that you have just given us pertaining to the sweet pickle cellar clerk, are those descriptive of all plant clerks in the South San Francisco plant in a general way?

A. Generally so, generally so. [17]

Q. Now as I understand the set-up, you, as the Superintendent, in conjunction with your foreman, are responsible for a particular department, is that correct? A. Correct.

Q. And part of the responsibility includes, of course, record keeping, and this record keeping is done by the plant clerk? A. Correct.

Mr. Scully: Just a moment. I am going to object on the ground the question is leading and suggestive, and I ask that it be stricken. It is the last question, with respect to which, I believe, there was an answer given on the record during the course of my objection.

Hearing Officer: Off the record.

(Discussion off the record.)

Hearing Officer: On the record.

(Testimony of Francis Stewart Sigler.)

Motion granted. Would you please rephrase the question, Mr. Bussman?

Q. (By Mr. Bussman): Is it correct that you, as Superintendent, and the foremen are responsible for a particular department? A. Yes.

Q. I think we have already established that part of the activities of a particular department is the record keeping function, is that correct?

A. That is correct.

Q. Now, would you state for us, then, who does that record [18] keeping work?

A. The record keeping is done by the clerk of that department.

Mr. Bussman: Would it be correct to say that the plant clerk is assisting the foremen who is responsible then, for record keeping in his particular department?

Mr. Scully: I am going to object on the ground that it is leading and suggestive.

Hearing Officer: Well I would suggest, Mr. Bussman, is it correct or is it not correct, then.

Q. (By Mr. Bussman): Is it correct or is it not correct that the plant clerk is assisting the foreman by maintaining records for which the foreman is responsible? A. That is correct.

Mr. Scully: Just a moment. I interpose the same objection. I believe, Mr. Hearing Officer, that we should have the testimony from the witness, rather than from counsel. Now, certainly, if that is deemed to be a question, and I submit it is complex and compound——

(Testimony of Francis Stewart Sigler.)

Mr. Bussman: Well, I am not so sure that we have not covered the point, anyway, and I am not going to go on with it further.

Hearing Officer: Well, objection overruled.

The Witness: There are many occasions when it is necessary that a foreman be absent from his department for supervisory meetings, time off for personal business, where the clerk is [19] asked to take over the supervision of the department during the short interval of the foreman's absence.

Q. (By Mr. Bussman): Do you have any departments, Mr. Sigler, where there is not a plant clerk?

A. We have one department where the clerical work requires but very little time, and is mainly done by the foreman of the department, although a clerk makes out one or two reports in connection with the production of that department. That is the Pard manufacturing department.

Hearing Officer: What?

The Witness: Pard dog food.

Q. (By Mr. Bussman): Are the plant clerks salaried, Mr. Sigler? A. They are salaried.

Q. Are they paid for the current week?

A. They are paid each week for the current week.

Q. Are the supervisory people salaried?

A. Yes.

Q. And are the supervisory people paid for the current week? A. On the same basis as clerks.

(Testimony of Francis Stewart Sigler.)

Q. Do the plant clerks enjoy the same vacation privileges that the supervisory people do?

A. They do.

Q. Do they enjoy the same privileges with relation to sickness and accident benefit payments that the supervisory people do? [20] A. They do.

Q. Are the plant clerks furnished work clothes?

A. They are.

Q. Are the employees in the plant furnished work clothes? A. They buy them.

Q. Do the plant clerks have a locker room?

A. They share a locker room with the foreman.

Q. Referring back to those records, which you named before as being kept by the plant clerk, are any of these records of a confidential nature?

A. All cost data, production data is confidential. We certainly do not want that information to get into competitors' hands.

Q. Now, what people in your organization would know the contents of those particular records relating to cost and production?

A. Myself, the division superintendents, my assistants, foremen, clerks, standards checkers have access to that information.

Q. Would a plant clerk ever have any connection with a grievance case in the particular department in which he was assigned?

A. In cases involving seniority or questions of whether or not the employee had received the proper pay, the foreman might instruct the clerk, and actually has in instances that I know of, to secure em-

(Testimony of Francis Stewart Sigler.)

ployment records from the employment record [21] files to determine the facts of the case.

Q. He accumulates this information for the foreman, is that correct?

A. Yes, he would secure the information for the foreman.

Q. Mr. Sigler, relating back, once again, to your reference about the duties and responsibilities, you mentioned computation of incentive earnings.

I am wondering if you would tell us what you mean by "incentive earnings," and, of course, that would involve a brief description of the standard system?

A. The standards plan, that Swift & Company has had in effect for many years, is a plan whereby a measurement is made of work to establish a normal time for the operation, a normal time for a job performed by a normally skilled operator under normal conditions.

The standard is established by means of a time-in-motion study in terms of standard hours. The premium earnings are arrived at by a standards checker going to the department in which the work is performed and from department records, and from conversation with the foreman and clerk, he determines, daily, the work performed in that department for the preceding day.

It is expressed and translated to the standards checking sheet in terms of hundred weight produced, hundred weight shipped, number of pieces handled, number of head of livestock [22] slaughtered, the

(Testimony of Francis Stewart Sigler.)

average weight of the animal, the sex, and in some cases, the age in the cooler of the animal or its component parts, a factor in the application of the proper standard.

After all the production data is put on the standards checking sheet by the standards checker, he goes over that sheet with the foreman; the foreman signs it, indicating its accuracy so far as he is able to ascertain. The sheet is extended by comptometer operators, total standard hours arrived at, and a premium or incentive pay calculated.

The standards checker must, in his discussion with his foreman and the clerk, determine if there are any abnormal conditions that occurred that day; such as delays, determine what operations for which there was no standard that was applicable, determine the time for such delays on known standard jobs.

I think that is about the picture

Q. How many standards checkers do you have at the South San Francisco? A. We have five.

Q. Is it correct or is it not correct, Mr. Sigler, from what you have said, that there are at least three figures which the standards checker must ascertain in order to figure incentive earnings? Now, these three figures would be the production data from the department involved, the hours worked by the employee on standards, and, of course, the applicable standard. Is that a correct statement or is that over simplified? [23]

A. That's stating it in condensed form. The de-

(Testimony of Francis Stewart Sigler.)

termination of the proper standard to apply for a job is a most important job. The standards checker must use the best of judgment in ascertaining conditions existing on a particular day in order to apply the correct standard to meet the condition.

Q. Could you give us an approximate idea of how many standards there are in effect in South San Francisco? A. There are several thousand.

Q. In order to apply the applicable standard, is it necessary for a standards checker to know the job description?

A. He must have a thorough knowledge of the operations of the department that he is checking in order to have the standard fit the job.

Q. You mentioned before, I believe briefly that there are several variables involved as to which standard would be applicable.

Could you give us some idea of what these variables would be?

A. A good example would be skinning calves. The hide of a calf that's been in the cooler four days before skinning is much more difficult to remove than one that's just been in the cooler for one day. There is a standard for a calf that has been in the cooler for four days and there is a separate standard for one that has been in the cooler for one day. The standard must fit the job. [24]

Q. Would the temperature of the animal make any difference?

A. Not so much as the age, which is the drying up of the hide to the carcass, and it makes it harder

(Testimony of Francis Stewart Sigler.)

to remove. There are temperature variables in some departments.

Q. And——

A. (Continuing): ——which would affect the standard to be applied.

Q. And where does the standards checker get this information from?

A. He gets his information from the foreman and the clerk. Those are his sources of information. The foreman is the responsible man for supplying him with proper information, and he is aided by the clerk.

Q. Are the incentive earnings posted, then, in the plant?

A. They are posted on the plant premises, yes, for the operators to see, one or two days after the work is performed, what their incentive pay amounted to.

Q. Perhaps it is almost too obvious to mention, but for the record, could you give us a statement of what the result would be if an improper application of standards were made?

A. If, in the operator's opinion, he was inadequately compensated for his extra effort on a particular day, he would certainly have a grievance.

Q. And who would he talk to if he was under that opinion?

A. Well, he would most assuredly go to his foreman and raise [25] a loud protest that his standards earnings must be in error.

(Testimony of Francis Stewart Sigler.)

Q. And what would the foreman's course of action be from there?

A. The foreman would either get hold of the standards checker himself, or the head checker, and he would demand that that standard sheet be brought back to the department for a recheck.

Q. Is it true or is it not true, that the improper application of standards would result in either overpayment or under payment, as far as the employee was concerned? A. Very definitely.

Q. Do the standards checkers have any desks?

A. Do they have what?

Q. Any desks?

A. They do most of their work in the plant department office, and have desk facilities in that office, usually the foreman's desk or adjacent desk.

Q. How long does it take to train a standards checker, Mr. Sigler?

A. Oh, I think that four to six months is a good average time that it takes for a man to become fully adequate.

Hearing Officer: May I interrupt here, just a moment? When you say in the plant department office that the standards checker has his desk, does that mean or does it not, that each department has an office in the plant, separate office, where [26] the foreman, the clerk, and the standards checker has his desk?

The Witness: We have a number of offices throughout our plant. In some cases, they are shared by more than one foreman. We have instances of

(Testimony of Francis Stewart Sigler.)

where one clerk does the clerical work for more than one foreman.

Mr. Bussman: Do you have anything else, Mr. Examiner?

Hearing Officer: No.

Q. (By Mr. Bussman): Are the standards checkers salaried? A. They are.

Q. And are they paid for the current week?

A. They are.

Q. Do they enjoy the same vacation and sickness and accident benefits and privileges that the supervisory people do? A. They do.

Q. And do they have a locker room?

A. They share the same locker room with the Division Superintendent and other members of the Superintendent's office. It's a separate room within our Superintendent's building.

Q. Are they furnished their work clothes?

A. They are.

Q. Did any of your present supervisors have experience as either plant clerks or standards checkers?

A. A large percentage were standards checkers and clerks before becoming foremen. We consider that those jobs are excellent training, excellent training for top supervisory jobs. [27]

Q. Mr. Sigler, I have one last question, and that is whether or not the plant clerks or standards checkers are presently represented by any union?

A. They are not.

(Testimony of Francis Stewart Sigler.)

Mr. Bussman: That is all I have for the time, Mr. Examiner.

Hearing Officer: Off the record.

(Discussion off the record.)

Hearing Officer: On the record. Mr. Scully?

Cross-Examination

Q. (By Mr. Scully): Mr. Sigler, could you give us a brief description of the location of the plant, and how it is divided?

A. Well, the plant is located on East Grand Avenue in South San Francisco. It is divided up into a number of what we call departments. Each department has a function, such as the dressing of cattle, the manufacture of Pard dog food, the curing of meats, slicing of bacon, smoking of meats. Those are all separate departments.

Q. And how many separate departments are there in the plant?

A. I do not have a list with me. I will have to get that information and furnish it to you.

Q. Well, your best approximation?

A. There are approximately thirty departments, as we recognize them.

Q. And with respect to these departments, are they physically [28] separated, one from the other?

A. Some are; some are contiguous.

Q. By that——

A. That is, within the same room, but supervised by different foremen.

(Testimony of Francis Stewart Sigler.)

Q. So that there are, maybe, no partitions, but the operations are in a separate portion of an unpartitioned room?

A. Generally, they are in a separate room or rooms, that is correct.

Hearing Officer: Well, that was not quite your question. He did not quite understand your question.

Q. (By Mr. Scully): My point is that, as I understand it, some of them are physically separated?

A. Most of them are physically separated.

Q. But some are in the same room without a partition, but the operations are in different portions of that unpartitioned room, is that correct?

A. Yes, that is correct. For example, cattle dressing, sheep dressing, and hog dressing are all in one large room, but no partitions between the departments.

Q. But there are separate foremen with respect to that large room?

A. There are separate foremen for those departments.

Q. Now, with respect to the office operations, as distinct from the plant operations, where are the office operations located [29] with respect to the production and plant operations?

A. You are referring to the offices in which the plant foreman and clerk——

Q. No. I am talking about the——

A. General offices?

Q. (Continuing): ——general offices of the Company?

(Testimony of Francis Stewart Sigler.)

A. They are in buildings that are apart from the plant property.

Q. What type of personnel are located in that business office?

A. To be sure that I understand your question, you are asking as to the type of personnel that we have in our general office?

Q. That is correct.

A. And we have a Superintendent's office that has a separate building from the general office.

Q. Well, first take the business office, if you can use that? A. Commercial office?

Q. Commercial office? What type of personnel are in those?

A. It houses the manager, auditor, commercial people, sales, accounting. That is the type of personnel.

Q. And with respect to office personnel, are the office personnel located in the business office. By that I mean, stenographers, typists, office clerks?

A. Yes, that type of personnel is there, but that type of personnel is also in the Superintendent's office. We also have typists, stenographers. [30]

Q. And, in addition to the typists and stenographers, what other personnel are located in the Superintendent's office?

A. We have people who do cost work.

Q. Could you describe them by job classification as people who do cost work? What do you call them?

A. We call them cost analysis men, is a term that

(Testimony of Francis Stewart Sigler.)

we use for a couple of them. We have a head checker.

Q. Now the head checker, is he a head standards checker?

A. He is a head standards checker.

Q. And he is located in the Superintendent's office?

A. He is located in the Superintendent's office.

Q. Could you briefly describe his duties?

A. His main function is to teach and instruct new checkers in their duties. There is a considerable learning period. He scrutinizes their work sheets, from time to time. He helps them investigate claims of error by the foreman or the workmen in departments. Those are his main functions.

Q. Well, as a matter of fact, is he not the immediate supervisor of the five standards checkers?

A. He is in a supervisory capacity over those five men, that is correct.

Q. I say, the immediate supervisor?

A. He is the immediate supervisor, that is right.

Q. Now, with respect to the records that are maintained, are the standard check lists, I believe is the term, is that a term [31] used on which these entries are made by the checkers?

A. It's a standards checking sheet, is the way it is referred to, a daily checking sheet.

Q. With respect to the standards daily checking sheet, what type of a sheet is that? Is it a typed or mimeographed sheet?

A. It is usually a stencil that has been cut.

(Testimony of Francis Stewart Sigler.)

Q. And where is that cut and prepared?

A. That is prepared in the Superintendent's office.

Q. And is it a uniform sheet for all of the various departments in the plant, to be used by the standards checker?

A. No, a special sheet is prepared, or sheets are prepared, for each department. There's no sheet that is applicable in all departments.

Q. So that in the Superintendent's office, depending upon the department that the checker is to be working in, he will have different types of checking sheets, is that correct?

A. State that again, to be sure I understand it?

Q. I said, as far as the standards checker is concerned, there will be different types of checking sheets prepared in the Superintendent's office, to be used by the standards checker, as he goes from one different department to another?

A. That is correct.

Q. And, with respect to those checking sheets, what entries are made on the sheets when the stencil is prepared? [32]

A. A description of the job, which may occupy one or more lines, certain job constants——

Q. Certain job what?

A. Constants, that are always the same. In other words, they are not variable operations from day to day.

Q. Would you say that you, could we use the term of fixed standards?

(Testimony of Francis Stewart Sigler.)

A. Yes, those would be fixed standards. That is applicable to it.

Q. In addition to that, what else would be on the stencil?

A. The variables would have a blank space for the standard itself. Those are the variables; the average weight of the carcass, the sex, as in the case of slaughtering operations.

Q. But those would be listed by designation under variables?

A. They would be listed by name, but the standard itself is one that the checker must consult with the foreman and the records in the department to obtain the proper average weight, animal, the proper average weight container. Perhaps, in some cases, it is a matter of trucking distances.

Q. But, whatever those variables may be for the particular department, there would be listed on the stencil, the variables?

A. They are listed on the stencils, but the standard itself is determined by the checker in the department, after consultation with the foreman and he fills that in with pencil.

Q. And what else is on the stencil sheet? [33]

A. There are columns for standard hours, which are filled in by comptometer operators, who extend the volume times the standard.

Q. Is there anything else on this checking sheet?

A. Space is provided, columns are provided for the hours worked by the operators doing the work. the operator's number, and the hours that he has on standard.

(Testimony of Francis Stewart Sigler.)

Q. Anything else?

A. There are recapitulation columns. There is a recapitulation sheet for the entire number of work sheets that are attached. There may be one in some departments; there may be as many as eight or ten in other departments. All are accompanied by a recapitulation sheet, showing the operator's number and his hours, total hours, total work units, total standard hours, from which the money calculations are finally arrived at.

Q. Is there anything else?

A. There is a sheet that lists the things that are not on standard which are delays, the day work operations for which there is no applicable standard, guaranteed time, if any.

Q. Anything else?

A. To the best of my recollection, that's what is on those sheets.

Q. All right. Now, who actually formulates these various stencils for the various departments? In other words, who decides what goes on there? [34]

A. That is generally done by the time study man, the time-in-motion study man.

Q. And is he the cost analysist?

A. No, he is not the cost analysist.

Q. Where is he located?

A. In the Superintendent's office.

Q. And he makes a determination as to what should go on these various stencils, is that correct?

A. The head of the standards department is the man, with his assistant and time study men. I am not sure, I can't be sure to what extent the checker may assist or participate. He may suggest revisions.

(Testimony of Francis Stewart Sigler.)

I'm not too close to that, but mainly it is done by the time study man, the head checker, and, I'm sure in some cases, assisted by the checkers themselves as to suggestions for changes in sequence of jobs that would make their workers clear.

Q. And with respect to the standards themselves, who established the standards?

A. Those are established by time-in-motion study men.

Q. And that is the same person located in the same place? A. That is correct.

Q. And with respect to the variables, who determines the variables?

A. The variable standards themselves are determined by the time-in-motion study men, always checked by the head of the [35] standards department, and the variable standards themselves are furnished to the checker in typewritten form in what we call a "standards book."

Q. In other words, in addition to the stenciled sheets, there are also what you have just referred to as a standards book? A. That is correct.

Q. And as I gather it, then they have in there, typed out for the checkers, what the standards are as with the variables? A. That is correct.

Q. And who devised and compiled that book?

A. The time-in-motion study men write up the standards before they are typed and after they have been checked and are approved by the proper supervisory personnel in the standards department.

Q. Now, would you define "the proper supervisory personnel in the standards department"?

(Testimony of Francis Stewart Sigler.)

A. The head of the standards department. There are also Chicago representatives who also check these standards before they have reached the stage of final approval, before they are typed and become the final approved standards.

Q. And is that the same as to the variables that are in the book?

A. That includes the variables, correct.

Q. And any changes that are made in either the changes or the variables, are they devised and agreed upon by the same personnel [36] that you have just mentioned? A. That is correct.

Q. And with respect to either the standard checkers or the plant clerks, do they change them themselves at any time or is that done only in the Superintendent's office with the time study, cost analysis people?

A. Those are the only people authorized to change the basic standards themselves. The standards checker selects, from the standards book, the proper variables to suit the condition that exists on that particular day.

Q. But he would have to select one that has already been established?

A. He has to select one that has already been established, he does not establish the grade himself.

Q. Now, with respect to these checking sheets, where are these sheets maintained for filing purposes? A. In the Superintendent's office.

Q. In the Superintendent's office? A. Yes.

Q. And with respect to the computation of the premium or incentive pay, that you mentioned, is

(Testimony of Francis Stewart Sigler.)

that also done in the Superintendent's office or in the business office?

A. No, that is done in the Superintendent's office.

Q. And, with respect to the preparation of the checks, whether they be normal weekly checks or vacation checks or similiar [37] checks, are they done in the Superintendent's office or in the business office?

A. They are done in the Superintendent's office. Checks are written in our timekeeper's office.

Q. Now, with respect to the five standards checkers, do they report to work by punching a time clock? A. They do.

Q. And where is the time clock located?

A. In the Superintendent's building or rather, a continuation of the time office, which is part of the Superintendent's building.

Q. And with respect to that time office, do not certain production workers also check in at that time clock?

A. The girls in our cafeteria also use that time clock because of its location, its closeness to the cafeteria.

Q. Any other production workers use that same time clock?

A. I believe that a livestock handler in the stockyards also uses that clock. That's all I can recall at the moment.

Q. Mention has been made of some lockers. Where are the lockers that the standards checkers use located?

(Testimony of Francis Stewart Sigler.)

A. In the first floor of the Superintendent's office.

Q. And do they each have a separate locker?

A. There may be instances of where two of them occupy the same locker.

Q. And are there any other, are there any production workers [38] who use that locker space?

A. Not to my knowledge.

Hearing Officer: Any maintenance men use the same locker space?

The Witness: No, no.

Q. (By Mr. Scully): Now, with respect to the operations of the standards checkers, there are five standards checkers in approximately thirty departments, as I understand it?

A. Yes, that is, there are definitely five standards checkers and the approximate number of departments is thirty.

Q. Now, with respect to each of these departments, there are foremen in charge of each of these approximately thirty departments, is that correct?

A. Well, in some cases, a foreman will have jurisdiction over more than one department. We speak of departments, rather than foremen. One foreman may have jurisdiction over more than one department.

Q. How many foremen do you have over the various departments?

A. We have approximately, it is variable, thirty to thirty-five foremen.

Q. And with respect to these foremen, how many

(Testimony of Francis Stewart Sigler.)

plant offices do you have for these thirty to thirty-five foremen? A. Approximately twelve.

Q. And with respect to the standards checkers, do they do their work in any one of these twelve plant offices? [39]

A. Yes, they work largely in the twelve plant offices.

Q. Well, I mean, they are not assigned to any particular one of them for all times?

A. A checker is assigned to check certain departments, and one checker may check four or five departments. He may travel from one plant office to another.

Q. In other words, he may use several offices or he may use one?

A. He may use, he may be confined entirely to one, as in the case of table-ready meats, a large department, he is confined to that one office. Smaller departments, he may have two or three.

Q. And it depends on what his functions are, and where he is moving from and to?

A. That is correct.

Q. And with respect to the work that he does in that plant office, is that simply filling out these stenciled sheets that you have described?

A. Let me describe it in this fashion. I have done standards checking. You, as a standards checker, these standards checkers—let's put it that way—this standards checker secures the time from the clerk. That is usually the first step. Then he obtains——

(Testimony of Francis Stewart Sigler.)

Q. Now, if I could interrupt you there, how does he secure the time? Does he go ask him for some time record he has? [40]

A. That is correct. He asks him for the time record. He also asks for various production records, which are sales tickets, transfer sheets, and similiar information.

Q. Now if I could interrupt you there, are those maintained in the plant office on a constant basis, or is that just with respect to the previous day's operations?

A. Some are maintained in the plant office. Others are locked in vaults. Others are stored, after a certain period of time, stored in certain record rooms.

Q. Well then, as I understand it, the standard checkers' sheets are kept in the Superintendent's office, is that correct?

A. Those are kept in the Superintendent's office.

Q. All right. Now with respect to these time records that you have mentioned, do they ultimately come to the Superintendent's office?

A. Those ultimately end up in a vault for an indefinite retention.

Q. And where is the vault located?

A. There is a vault in the, in our time office.

Q. That is in the Superintendent's office?

A. In the Superintendent's office, and in some cases, those records are stored in a larger vault in our general office.

(Testimony of Francis Stewart Sigler.)

Q. In the business office?

A. That is correct.

Q. All right, and with respect to the thirty odd departments, [41] how many departments send their time records to the Superintendent's office?

A. All time records are sent to the time office.

Q. And when are they sent to the time office?

A. On Monday of each week for the preceding week's work.

Q. So then, the most time records are kept in any plant office is for a one week period, is that correct? A. That is correct.

Q. And when these records are sent into the Superintendent's office, are they reviewed by any of the supervisory or clerical personnel in the Superintendent's office before they are stored?

A. They are checked by time office procedures.

Q. Are they checked against these daily stencilled checking sheets of the standards clerks?

A. No, there is no check on those at all.

Q. Who, if anyone, checks these checking sheets of the standards clerk when they come into the Superintendent's office?

A. They are handed by the checkers to the comptometer operators for extension. There is no preliminary checking. There may be some exceptions to that, but that is the general rule. They are handed directly by the standards checker to the girls that do the comptometry work.

Q. And the comptometer work is what, the computation?

(Testimony of Francis Stewart Sigler.)

A. That is the computation of the standard hours, the computation [42] of the rate of production.

Q. And when that computation is complete, to whom do the comptometer operators submit their determinations?

A. There are questionable cases where it goes to the head of the standards department for scrutiny, or rather, let's put it this way, he is making spot checks regularly. He and his assistant are scrutinizing these sheets at least some of them. They make what we call "spot checks."

Q. In other words, the standard and the head checker, is that correct?

A. The head of the standards department and his assistant and the head checker will all make spot checks.

Q. When the spot checks have been made, or those that are not in the spot check, are completed, where are they transmitted?

A. Where are they transmitted?

Q. Yes.

A. The sheet itself is stored in a vault in the Superintendent's building.

Q. Kept in the Superintendent's building?

A. Yes.

Q. Now, you have made reference to employment records. You said occasionally, that someone will be instructed to bring, to obtain employment record files.

Where are those kept?

(Testimony of Francis Stewart Sigler.)

A. In our employment office. The service records of all [43] employees are.

Q. That would be the business office?

A. No, that is the Superintendent's office.

Q. The Superintendent's office?

A. The Superintendent's office.

Q. Now with respect to the standards checkers, when they are going through the plant, they have this printed booklet and they have the stencil and they make certain entries. As I understand it, they do not sign the stencil, the foreman does?

A. The foreman signs the recapitulation sheet, that is correct.

Q. And the foreman reads it and checks it, is that correct? A. Yes, he looks it over.

Q. And if an error occurs, does he correct the error?

A. He calls the standards, calls for the standards checker to bring the sheet back to the department, and he will go over it with that standards checker, and in some cases, the head checker.

Q. Well then, as I understand it, the standards checker is not there personally. He leaves the sheet there for the foreman to sign, is that it?

A. No, he takes the sheet with him after he has completed the sheet. He hands it to the foreman for signature, and the sheet is then taken by the standards checker directly to the standards office in the Superintendent's office. [44]

Mr. Scully: Well, the point I am making is, as

(Testimony of Francis Stewart Sigler.)
the standards checker hands it to the foreman and he checks it, and the foreman finds a mistake in that stencilled sheet——

The Hearing Officer: Before signing it?

Q. (By Mr. Scully): ——before signing it, does he then make the corrections?

A. No, not the standards, no one is permitted to make alterations on that but the standards checker himself. He is responsible for that sheet.

Q. And does the foreman tell him to make a certain entry?

A. The foreman may cite an error, what he thinks is an error, and ask him to recheck it.

Q. All right.

A. The foreman has no authority to put one single thing, one single figure on that sheet. That is the standards checker's job.

Q. And if there is an error, and the standards checker will not correct it, does the foreman then sign it? A. No, sir.

Q. What does he do then?

A. Any question of error that the standards checker will not affirm, or will not correct by putting in a corrected figure, or, in other words, if he has reason to believe that information given him is incorrect, he will discuss the matter with the head checker or the head of the standards department, whichever one [45] happens to be available at the time.

Q. In other words, he will then go to the head

(Testimony of Francis Stewart Sigler.)

checker, or to the standards department head, rather than instructing the standards checker to make a correction before he would sign it, is that correct?

A. You mean, are you speaking of the foreman?

Q. The foreman.

A. That the foreman will go?

Q. Yes.

A. In a case of that sort, and that would be a rarity, of where a standards checker would refuse to put in information given him by the foreman, the standards checker would go to the head of his department and describe that situation. I am certain that's what he would do. A situation like that would be a rarity, I am sure. I don't know of any such.

Q. Well, as I understand it, it is the foreman, and not the standards checker, who signs the sheet?

A. He signs the sheet to indicate that he has seen it and, to the best of his knowledge, it is correct. That is the purpose of his signature, that he has seen it.

Q. But the foreman is the one who signs it, not the standards checker?

A. The foreman, that is correct.

Q. Now with respect to the standards checker, what data does he obtain from the plant clerk with respect to these stencilled [46] sheets?

A. I didn't get your question.

Q. What data does the standards checker obtain from the plant clerk with respect to these stencilled sheets?

(Testimony of Francis Stewart Sigler.)

A. The majority of information that the standards checker puts on the standards checking sheets, that is the production data, comes from records that are made out by the department clerk.

Q. In other words, that is the type of product the individual had worked on, the hours of work, and things of that nature, is that it?

A. That is correct.

Q. And with respect to that data, does he simply copy what is on the records of the plant clerk?

A. He translates that information to the standards sheets. I say that he translates it, because he has to take the information that are on what we call, "department records," and adapt it to the standard sheets.

Q. What data does he take, and how does he adapt it? Describe that to the Hearing Officer and myself.

A. I will use my curing cellar example, with which I am so familiar, because I was once clerk of that department myself.

Q. All right.

A. The product that goes in to cure each day is on a record sheet made out by the clerk, but the standards checker must ask [47] the clerk what location in the curing cellars the product was put down. That is necessary because there are standards to cover the varying distances from what we call the green grading area to the put-down area, involving considerable trucking labor.

Q. So then, as I understand it, on the plant

(Testimony of Francis Stewart Sigler.)

clerk sheets, there is certain data that is not present with respect to the location of products, is that correct?

A. That is right, which the standards checker must ascertain, either from the clerk or foreman.

Q. All right, and when the clerk tells him, he just makes that entry? He does not make any physical inspection to verify that data, is that correct?

A. There might be occasions when he might question the accuracy of information, as he understands it, and he might go, physically check it. I have done that myself, when I have checked standards sheets.

Q. If the standards checker and the clerk do not agree, what happens then?

A. The next logical step would be to call the foreman into the picture, if they can't get agreement. I am sure they will call in the head of the standards check cannot agree, then it would go

Q. So then, if the foreman, the clerk, and the standards checker cannot agree, then it would go back into the Superintendent's office via the standards and the head checker, is that correct? [48]

A. That is correct.

Q. Now, with respect to the compensation paid to the standards checker, the testimony is that they are paid on a salary basis, is that correct?

A. Correct.

Q. If they had an unexcused absence during a work week, is there any deduction made for this from their salary?

(Testimony of Francis Stewart Sigler.)

A. Depended upon their service and the particular conditions surrounding that absence.

Q. Well, could you explain a little further on that?

A. Ordinarily, salaried employees, who are absent due to some illness——

Q. I am just talking about unexcused absences?

A. An unexcused absence, oh, I misunderstood. An unexcused absence; you are talking specifically about a standards checker or clerk or any salaried employee?

Q. No, standards checker, only?

A. The unexcused absence of standards checker or any salaried employee at Swift & Company must be explained before he is paid, or he is not paid, depending upon the circumstances of his unexcused, unexplained absence. He may conceivably be able to talk his way out of it.

Q. So it may or may not be deducted, depending upon the nature of his excuse, is that correct?

A. That is true of anyone, and irregardless of the length of [49] their service. They must have a reason for being away that is a logical reason before they are paid.

I might add, that we have, it's such a situation as non-existent, as far as I know. I don't know of any such case of an unexcused absence. I can't recall one.

Q. Now, references have been made to sick and accident, or health and welfare benefits that are payable to the standards checkers and to the clerks.

(Testimony of Francis Stewart Sigler.)

Do you have sick and accident or health and welfare benefits payable to the production employees presently represented by the Petitioner?

A. We do.

Q. And how do they differ from the health and welfare and sickness and accident benefits paid to the standards checkers?

A. They are essentially the same.

Q. They are essentially the same?

A. They are essentially the same.

Q. And reference has been made to vacation pay.

A. Let me go back over that question again. I want to be certain that I am not confused. Are you talking about hospitalization, medical, surgical, benefits or pay for illness when sick?

Q. I am talking about whatever the sickness and accident benefits that you testified to, that the checkers got, that was comparable to the supervisory personnel, as you used the term?

A. Well, I wish to correct my statement. There is a difference [50] in the sickness and accident pay to salaried employees as distinguished from the hourly paid plant employees. I misunderstood your question.

Q. Would you explain the difference, please?

A. Plant employees, represented by the bargaining unit, are paid for sickness, dependent upon their length of service.

Q. How are the checkers, standards checkers, paid?

A. (Continuing): ——and our plant employees,

(Testimony of Francis Stewart Sigler.)

production workers are paid so much half pay for each year of service, whereas, the salaried employee receives a full pay, as compared to half pay.

Q. In other words, the distinction is the amount of the pay? A. The amount of pay.

Q. Now with respect to this hospitalization benefit, that you refer to?

A. That is where I misunderstood your question. As far as the hospital, medical, surgical benefits are concerned, there, the salaried employees receive essentially the same benefits as do the production workers.

Q. And that is under a plan of Swift & Company?

A. That is the Swift & Company plan.

Q. And with respect to the sickness and accident half-pay that you mentioned, that is paid to the production workers, is that as a result of a provision in the collective bargaining agreement with the petitioning Union? [51]

A. That is right.

The Hearing Officer: May I ask a question here?

Are the clerks, typists, and stenographers in the Superintendent's office and the commercial building also on a salaried basis?

The Witness: They are all on a salaried basis.

The Hearing Officer: All the employees in the Superintendent's building and the commercial building?

The Witness: And the commercial building, all on a salaried basis.

(Testimony of Francis Stewart Sigler.)

Q. (By Mr. Scully): And with respect to the office clerical and the ones of the Superintendent's building, do they also receive sickness pay?

A. The office clerical people in the Superintendent's building?

Q. Yes.

A. They are handled identically the same as the standards checkers and all salaried personnel in the Superintendent's—under the Superintendent's jurisdiction.

The Hearing Officer: Off the record.

(Discussion off the record.)

The Hearing Officer: On the record.

Q. (By Mr. Scully): Now, if we may go, just for the moment now, to the plant clerks, as distinct from the standards checkers that you have mentioned, could you give me the number of [52] plant clerks that there are employed?

A. There are twelve.

Q. Twelve plant clerks?

A. Twelve plant clerks.

Q. So that we can get the designation of the people, in addition to their position, could you describe by name, who the standards head is?

A. It is William A. Turnbull, T-u-r-n-b-u-l-l. He's the head of the standards department.

Q. And who is immediately, who is his immediate assistant? A. L. A. Wright, W-r-i-g-h-t.

Q. And that is the individual referred to as the

(Testimony of Francis Stewart Sigler.)

assistant head? A. That is correct.

Q. And with respect to the head checker, could you describe him by name?

A. Royce Welch, R-o-y-c-e, W-e-l-c-h.

Q. Now with respect to the plant clerks, who are approximately twelve in number, I gather that some of those clerks work for a number of these thirty to thirty-five foremen, is that correct?

A. That is correct, yes.

Q. Now, with respect to the plant offices, is there a clerk in each one of these plant offices or are there more plant offices than there are plant clerks? [53]

A. There are approximately the same number of offices as there are plant clerks.

Q. And with respect to the plant clerks, do they, like the checkers, go from one office to the other, or do they stay in one office?

A. The majority of them stay in one office. We do have instances of some two or three men who do travel to a second office. I don't believe that any clerk uses more than two offices to a department.

Q. Now you described the duties of the plant clerk, such as keeping time records and weighing products and things of that nature. When they are doing such items as weighing, where are they located in relationship to production employees?

A. They are located, in most instances, within the confines of the department where the work is performed. There are exceptions to that. There are several exceptions to it. It's both ways. In other

(Testimony of Francis Stewart Sigler.)

words, some are actually within the confines of the work room and others, they are in a separate room or building.

Q. And so then, they are moving about within the departments where these production people are working, is that correct?

A. To a limited extent. When they travel from one office to another, that is about the extent of it, excepting when they relieve the foreman for a short period of time, in which case, they are actually out—— [54]

Q. Well, I am not talking about relieving the foreman. I am talking about when they are performing what you described as their duties, and the one I am giving you for an example is weighing products as they are going in.

A. That is done within their plant office. In other words, that scale is inside the plant office so that the load of products, which is just immediately outside the office, is weighed by the clerk who is inside his office with the beam end in where he can make, rather, manipulate it.

Q. Does he put the material on the scale and take off the material, or compute the measurement?

A. He does nothing of that sort. He only manipulates the scale.

Q. And who does the putting on and off of the scales? A. The production workers.

Q. And they are immediately adjacent to him as this is going on? A. Correct.

Q. And with respect to the trucking of the ma-

(Testimony of Francis Stewart Sigler.)

terial, say, from time to time he will tell the production workers to which place they should truck the material? A. That is right.

Q. It is the same situation there?

A. He instructs them. I gave the instance of the curing cellar, which I know so well from personal experience, where he [55] directs them to the area in the cellar, curing cellar, that the product is to be stored. That goes on his records.

Q. And as I understand it, with respect to the tierce, I believe that is the proper pronunciation?

A. Yes.

Q. The importance there is in the proper moving of that so that it can cure properly, is that right?

A. That is right. He visually instructs. He points out, he designates the barrels that are to be moved.

Q. But I mean, the point of the moving is the curing process in the course of the production?

A. That is the curing process, and he actually sees the product and designates what tierces are to be moved because all are not moved at the same time.

Q. And the moving from one place to the other is the most important thing in the production of that particular product?

A. That is right.

Q. You also mentioned that this clerk makes out vacation slips for the employees.

When he makes those out, does he hand those to the employees or do they go to the plant Superintendent's office or the business office?

(Testimony of Francis Stewart Sigler.)

A. Those vacation slips, as we call them, are handed by the clerk or the foreman to the timekeeper.

Q. Now the timekeeper is located where? [56]

A. In the Superintendent's building.

Q. And you say they are handed by the clerk or by the foreman. Which is the general practice, the foreman or the clerk?

A. I'd say it's 50-50 perhaps.

Q. In other words, they leave the plant and go over to the separate building and hand them in?

A. And hand them over.

Q. And then the computations are made then in the Superintendent's office? A. Correct.

Q. Now you mentioned that from time to time, if the foreman is absent from the department, that the clerk is asked to take over temporarily and take on his duties as plant clerk? A. That is true.

Q. Is it not also true that the production employees, from time to time, are asked to do the same thing?

A. Yes, we have production employees that are, that relieve supervisors and are paid an appropriate rate for such responsibility.

Q. Now with respect to the plant clerks, as distinct from the standards checkers, do they also check in by punching a time clock?

A. They punch a time clock.

Q. And where is the time clock located?

A. The majority of them punch the clock which is in closest [57] proximity to their office.

(Testimony of Francis Stewart Sigler.)

Q. Which is used by the other production employees? A. That is correct.

Q. And with respect to lockers, do they use lockers still?

A. The clerks have lockers in the same room with our foreman.

Q. And where is this room that the lockers are in?

A. It is located in our, what we call our main dressing room building, which is a separate building. It is a dressing room building.

Q. And do production employees use that locker room?

A. They don't use that same room. They, there are other rooms in the same building that are the locker rooms for the production workers.

Q. Now with respect to the various records that are kept, you have stated that all cost of production data is confindential.

Now, what do you mean by the term, "confidential"?

A. Records are confidential that we only wish to have accessible to supervisory personnel.

Q. Now, do you mean that the time standards are confidential or the production standards are confidential? Just what do you mean? Are the premium rates? What is it that is confidential in these, the "data," as you use the term?

A. There are degrees, I'm sure, of confidential records.

(Testimony of Francis Stewart Sigler.)

Q. Well, let me ask you——

A. Some are highly confidential, others are not as confidential, [58] for example, cost data.

Q. Let us take the standards first, those that are standards and those that are variable. Is it not true that any employee can ask what the standards are on any job that he is on?

A. They have that right.

Q. And with respect to the rates of pay, is it not true that any employee can ask for that information?

A. Rates of pay for production workers are negotiated and are available for all employees.

Q. And with respect to the time studies, is it not true that the information of the time study is also available to the union representatives?

A. That is correct.

Q. Well, could you tell me what of this data is not available, either to the employees or to the Union?

A. You are talking of standards, standards alone?

Q. Any of this data that is compiled by either the plant clerk or by the standards checker?

A. We consider all cost data and production records to be confidential.

Q. All right. Now as far as production records, what are the factors in production records that are confidential?

A. We most assuredly are not anxious for competitors to know our costs.

(Testimony of Francis Stewart Sigler.)

Q. Well, I am not speaking now of your competitors. I am [59] speaking of the employees and the union representatives in this plant.

A. We still consider that information confidential.

Q. Now, is it not true, or rather, before I ask you this question, for the purpose of advising you on the basis of the question, I will hand you a document dated September 24, 1954, from a K. M. Richardson, General Superintendent, as a basis for the question I am about to ask you.

Now, I ask you, is it not true that the Union has the right, at any plant where they have bargaining rights, to select a member to be trained in time study and the incentive plan and practices, depending upon the number of employees, they may have two or more so selected, and that they are then trained by the company and made familiar with the procedure of the company, and that as far as the companies, themselves, are concerned, that they will be given an opportunity, as representatives of the union, and without loss of pay, to enter into a review of all the standards that may be in dispute under the collective bargaining agreement?

A. Standards, yes, standards only.

Q. Well, does that include time studies?

A. That includes time studies. That is standards and standards alone. You mentioned the cost data, and I exclude that.

Q. Now with respect to the production standards, as distinct from time standards, I will ask you if the

(Testimony of Francis Stewart Sigler.)

collective bargaining [60] agreement existing between the Petitioner and the Company does not also provide, in Article 7, Section No. 3C, that where any standards are to be changed or are to be applied to new operations, that not only shall the employee be advised, but that the Union shall also have certain rights with respect to the production records?

A. That is very clearly spelled out.

Q. Now as I understand it, there is one point that we are not clear on, and that is some data which you refer to as "cost data."

Could you, for the information of the Hearing Officer and myself, clarify what you mean by cost data which is confidential?

A. Indeed I can. Our plant clerks make out, usually on a weekly basis, cost reports which show the various component parts of our, of what the cost is to us to manufacture that product.

Q. Now, what are the component parts that you make reference to? What are they?

A. Those are supplies, supply costs, labor costs.

Q. Now first of all, take supply costs.

What do you mean by, "supply costs"?

A. The cost of the container in which the product is packaged.

Q. All right, and with respect to labor costs, what do you mean by "labor costs"? [61]

A. The actual cost as we have determined, from our standards department accounting procedures, the actual cost of labor to package that particular product.

(Testimony of Francis Stewart Sigler.)

Q. And what other factors come within——

A. There are repair costs.

Q. That is, repair costs generally in the department?

A. There are steam and power costs.

Q. But I say, the repair costs generally in that department?

A. That department, as applicable to that department.

Q. And you say steam costs?

A. Steam and power, yes.

Q. Now is that steam and power broken down as to the department or the department of steam and power?

A. That is, it is broken down for each department, that is correct.

Q. Who breaks that down for each department?

A. In some instances, it's by actual pounds of steam used in a certain operation, such as a retort.

Q. And in other instances?

A. I would have to consult with my chief engineer to see just how he does break that down and furnish it to the several departments. We have some departments use very little and others use much, actually, we can't obtain accurate costs unless we break it down to fit the particular operation requiring steam.

Q. Now in addition to those four, what are the other factors [62] that you place in this category?

A. There are various overhead costs that are

(Testimony of Francis Stewart Sigler.)

also applied to the package or the product in question, so that all added together, we know——

Q. If I may interrupt you, overhead costs, what do you mean by "overhead costs"?

A. That's our commercial expense, our selling expense, our supervisory expense.

Q. All right, now with respect to the container cost, who obtains that information and to whom is it transmitted for the computation of this cost data?

A. The foreman or the clerk, either may obtain that information from the purchasing department.

Q. And the purchasing department is located in the business office?

A. In our general office, the business office.

Q. The business office, so that is obtained from the business office and placed upon a cost sheet, is that right? A. Right.

Q. All right. The labor cost, from whom is that obtained and to whom is it transmitted?

A. It is obtained from the standards department in the Superintendent's office.

Q. That is from the standards department, Superintendent's office. [63]

The repair costs, from whom is that obtained and to whom is that transmitted?

A. That is obtained from our supervisor, our chief engineer, and master mechanic, or clerk.

Q. And where is that located?

A. In the Superintendent's office.

Q. The Superintendent's office.

(Testimony of Francis Stewart Sigler.)

And the steam and power, from whom is that obtained and to whom is that transmitted?

A. Also from information that is accumulated by our supervising engineer, our chief engineer, and his clerk.

Q. Again, the Superintendent's office?

And the overhead cost, from whom is that obtained?

A. That is obtained from our accounting department.

Q. And that is in the business office?

A. That is in the business office.

Q. All right, now when that is obtained, and you say it is usually obtained by the foreman or by the clerk?

A. The clerk who makes out these cost reports usually is the man who contacts the department from which this information must be obtained.

Q. Then he makes it on some sort of a sheet, is that correct?

A. It is made out on a regular form.

Q. The form supplied to him by the Company?

A. That is correct, and it may list one product or it may [64] list forty products, as is the case in our department.

Q. And then, that is transmitted to whom, by the clerk?

A. It goes to the, one copy goes to the Superintendent's office, one copy goes to our Chicago General Superintendent's office, a copy goes to commercial departments, who use it in their——

(Testimony of Francis Stewart Sigler.)

Q. But it is not retained in the plant office?

A. Copies are retained in the plant office, yes.

Q. And how long are they retained in the plant office?

A. I don't know, off hand. We have a schedule for retention time for all reports. It may vary from three months to indefinitely, depending upon the importance of the report.

Q. You say the importance you attach to it?

A. The importance insofar as it, whether or not it, the product in question, has been disposed of, has been sold. These records also include volume data, along with cost data.

Q. Now, you mentioned you kept certain records in a vault.

You do not keep these records in a vault then, is that it?

A. No, generally speaking, these cost records are not kept in a vault, no.

Q. Is there any Company policy why you keep certain types of records in a vault and other records not in a vault?

A. Time office records, payroll records, we keep indefinitely.

Q. No, but I say, why you keep them in a vault as distinct in not keeping them in a vault?

A. Destruction by fire would be one of our reasons, and also, [65] the fact that, what shall I say, we just want them under lock and key, because we don't want everyone having access to them.

(Testimony of Francis Stewart Sigler.)

Q. But, with respect to these confidential cost data, they are not kept under vault?

A. No, they are not kept under vault.

Mr. Scully: That is all I have.

The Hearing Officer: Have you any further questions, Mr. Bussman?

Mr. Bussman: Yes, sir, I do, just a few. I am wondering if you had anything? If you do not, I would like to ask for about three minutes, if I may, and I will be right back?

The Hearing Officer: All right. We will now take a short recess.

(Short recess.)

The Hearing Officer: All right, Mr. Bussman, you may proceed.

Redirect Examination

Mr. Bussman: Before, reference was made to the head standards checker, and I believe Mr. Scully referred to him as the supervisor, which he is in fact.

I was just wondering if the Petitioner is making any claim for him?

Mr. Scully: No.

By Mr. Bussman:

Q. Mr. Sigler, to help clear up the confidential nature of the records that we discussed before, what did you mean when you used the term, "confidential"? [66]

A. I am reasonably certain that in the record, I stated that we certainly would not want our

(Testimony of Francis Stewart Sigler.)

competitors to know our costs or our production data. To me, that is the meaning of confidential. We certainly do not want outsiders to have access to this data. We don't want this information to be known to our competitors. It wouldn't be good business.

Q. Reference was made before, I believe, to the standards checker taking information from the plant clerks, records relating to the time that an individual employee may have worked, transcribing that information from the plant clerk's records to the standards sheet?

A. You mean for daily production, for computation of incentive pay daily?

Q. Yes, sir. What I wanted to ask you was, are those figures, as they are taken from the plant clerk's records, put directly on the standards sheet, or is there any computation that the standards checker must do?

A. He, for example, if a man works eight hours, a normal day, eight hours will show on the time sheet as made out by the clerk. The standards checker breaks that eight hours down into time on standard, delay time, if any, known standard time, guaranteed time, which is time paid for but not worked. That is the breakdown of time as the standards checker must take it, and put it on his standard sheets.

Q. And if we refer to the time, as it appears on the plant [67] clerk's record, as the gross time worked, I take it that these computations must be

(Testimony of Francis Stewart Sigler.)

done and then what we end up with is the net time which is used for figuring incentive earnings, is that correct? A. That is correct.

Q. We were talking before about the variables which the standards checker must take into account in filling the applicable standard.

Is it conceivable that this list contained in the book would list every conceivable variable?

A. Not necessarily. An alert checker, and we certainly expect them to be alert, he is on the lookout for any variables that the standards does not cover.

Q. What does he do with such information?

A. Well, he reports it to the head of his department, and an investigation is made to see if the standard fits the particular job.

Mr. Bussman: That is all the questions I have, sir.

Mr. Scully: Well now, with respect, pardon me.

The Hearing Officer: Was that with respect to reporting?

Mr. Scully: No, no, I was just going to start a question.

The Hearing Officer: All right, proceed, please.

(Testimony of Francis Stewart Sigler.)

Recross-Examination

By Mr. Scully:

Q. With respect to recommendations that would be made by the standards clerks for changes in the pamphlet or [68] book, is it not true that the production workers also make suggestions as to changes in the plant operations and have a suggestion box for that? A. We welcome it.

Q. And the determination, as to whether either a recommendation of a production employee or standards checker shall be resolved, is something that is determined by management?

A. I don't think we should confuse, or at least, certainly, I, in my own mind, do not wish to confuse a suggestion made by any Swift employee, whether he be a salesman, production worker, or supervisor. We want suggestions from all of our people, no lines drawn, with the checker's duty to make the standard fit the job. If he fails to do that, on the one hand, we would have the employee who would not be paid the way we want him paid, which is for every bit of production that he turns out. We want him paid for his effort.

Q. But the standards are actually fixed by the head of the standards department, is not that correct?

A. The checker does not determine the standard itself. It is his duty, his function to know what that standard is intended to cover in the way of work performed.

(Testimony of Francis Stewart Sigler.)

Q. And the employee is entitled to ask and obtain which standard is applicable to his job, is not that true? A. That is right.

Q. Well, the employee actually knows it? [69]

A. That is right.

Q. And who does he usually ask what standard is applicable to his job?

A. The employee should go to his foreman.

Q. And does the foreman, what does he find out, what standard is applicable?

A. I believe that the foreman, in a case of a request by an employee, would refer that employee to the head of the standards department, or would call the head of the standards department, down to that department. That has been done, I know that has been done.

Q. And the head of the standards department would then tell him what it was?

A. That is right, to be positive that there are no misunderstandings in regard to the applicability of the standards to fit a particular job. I do want to add that the checker is in charge. One of his main functions is responsibility to see that the standard that he uses fits the job picture, because, sincerely, we want our people to be paid for their efforts. That's the basis of our incentive plan, but we do not want them to be paid for something they do not do. But, on the other hand, we want them to be paid for every bit that they do do.

Q. And actually, the data that the standards

(Testimony of Francis Stewart Sigler.)

checker gets is the basis for determining the premium or incentive pay?

A. That is absolutely correct. He is the key man. [70]

Q. And he does not fix any guaranteed pay rate? He just determines the basis for computation of the incentive pay, is not that correct?

A. He puts on two sheets, the volume of production data. That is the base for computation of incentive pay.

Q. But the point I am trying to get at, if the head standards believes that on job #1, standard #1 is applicable, which will give a rate of pay of a dollar; that is the standard that must be applied by the standards checker, and he cannot apply a standard of $1.25 because he thinks it more properly should be $1.25?

A. No, sir, you have a mistaken impression. The standards checker selects the variable standards to be used each day to fit that particular job, and not one per cent of the figures that he puts on that sheet are actually audited and checked. They are his, what he determines is the proper application for that job.

Q. Well then, as I understand it, it is now your testimony that it is not the head standards checker, his assistant, and the time study man that determine the particular variables and standards that should be applied?

A. I am afraid that you are not quite clear.

(Testimony of Francis Stewart Sigler.)

Perhaps I should put it this way? Let me redefine the function of the time study man.

The head of the standards department and his assistant, in the establishing of standards, those are established and the [71] standards checker does not have a part in the establishing of those standards.

Q. I am also talking about variables. It is my understanding that the same people establish the variables.

A. They do establish the variables, that is correct.

Q. And they establish them on some plant policy basis, as to what variables should apply under a certain set of circumstances, is not that correct?

A. Yes, that is correct, they are.

Q. The question I am now asking is a certain set of circumstances being established by them to warrant that variable #1 being applied, is it not true that variable #1 must be applied by the standards checker?

A. That is correct, if it meets a particular situation, as defined by the description of that variable, that is correct.

Q. So the point we are back to, then, is the circumstance as to well, as to whether a standard or a variable shall be applied is determined by these three sources, and if those circumstances exist, then the standards checker must apply them?

A. But the standards checker's responsibility is to determine what variables do exist, so he can

(Testimony of Francis Stewart Sigler.)

apply the variable that fits a particular variable standard.

Q. Well, actually, what you are attempting to say, I believe, is that the standards checker must verify that the circumstance which his supervisors have found to warrant the application of [72] a variable, in fact, exist, and then the variable is applied automatically?

A. That is correct, that is correct.

Mr. Scully: That is all.

The Hearing Officer: Mr. Bussman?

Mr. Bussman: Nothing, sir.

The Hearing Officer: Well, I have one or two questions.

Q. (By Hearing Officer): To take your example, Mr. Sigler, of the plant clerk and the curing cellar, supposing he were sick and absent from work one day, who would do his work?

A. In the situation existing right now, we would take a foreman who formerly held that job, a foreman whom we can spare for a day or two. We are that flexible, and he would handle this man's job. We have no one else, at the present time, who is broken in. In other words, about a year to a year and a half ago, the man who was the clerk in the curing cellar is now a foreman of another department, or rather, an assistant foreman, and we have had occasions, within recent months, one was a vacation of the regular clerk. He was replaced by this foreman. It is a job that takes considerable experience to handle.

(Testimony of Francis Stewart Sigler.)

Q. Does the clerk in the cellar department have any supervisorial function over the operating employees, other than the one you described, where he tells the operating employee in what part of the cellar to put certain products at a certain time? [73]

A. He directs, during the day, where meat shall go, what bin they shall go in, in a certain storage room. He directs them as to whether they shall go, other meats shall go directly to our smoke house or shall go to what we call, "dry pack."

I consider that those, when a man directs an employee where to take something, what to do with it, I certainly consider that that is a supervisory function.

Q. Well, does he have any other supervisory function in telling the production employees where to put the materials or the products?

A. This particular clerk has a specific job of directing workmen in the overhauling of tierces of beef animals. It happens to be a job that I personally assigned to him a long time ago, a year ago.

Q. Well, just what sort of directions does he give them?

A. He designates the barrels that are to be overhauled by rolling, and he designates the area in which they roll. They have to be rolled a specific distance. The directing of the movement of these meats has always been the function of this job. This is nothing new. It was true thirty-two years ago, when I handled the same job. It is true now.

Q. Well, does the plant clerk have anything to

(Testimony of Francis Stewart Sigler.)

do in relations to hiring or firing or reassigning men, or promoting men, or changing the personnel status of production workers that he directs in the fashion you have described? [74]

A. No, the clerk does not perform those functions.

Q. He does not rate the employees?

A. He does not hire, he doesn't rate the employee.

Q. Is he expected and required to make any effective recommendations about these operating employees?

A. Normally, our foreman and clerk are a very close team. It is a very close team, and if, in the judgment of the foreman, the clerk has qualifications that he wants in his possible successor, he will endeavor to do a good job of training him, follow in his footsteps, and that would include a discussion of the qualifications of the people in the gang. I am talking from personal experience. I traveled that route.

Q. Yes. Well, when you were formerly a foreman in the cellar department, did you make the decisions as to what recommendations should be made?

A. The foreman makes the decisions, that is his job, yes, sir.

Q. And the foreman consulted the clerk, primarily from the point of view of training the clerk?

A. He is not compelled to, but it is part of a training program, that is right.

Q. Rather than from the point of view of having

(Testimony of Francis Stewart Sigler.)

what the clerk said affect the decision made by the foreman, is that correct?

A. He might value his opinion, but the decision is the [75] foreman's. I know of specific cases of where clerks have assisted in the preparation of data for grievance procedure.

Q. Is that common?

A. It is not an every day affair. We don't have grievances every day.

Q. Do most of the clerks do that?

A. No.

Q. In other words, it is rare that a clerk assists in such activities?

A. I will answer that in this way. The majority of grievances are handled directly by the foreman, with the aggrieved person, without the clerk. It is a verbal discussion, and it is only where records are involved that the clerk would normally be brought into the picture.

Q. Well, the clerk would be asked to give the information?

A. That is correct. He would compile the information.

Q. He would not actually handle the grievance?

A. He would not actually handle the grievance. That is the foreman's job.

Q. Now, with respect to the standards checkers, are clerks sometimes promoted to standards checkers?

A. We have had it worked both ways. We have had clerks transferred to our standards department,

(Testimony of Francis Stewart Sigler.)

and standards checkers transferred to our plant clerks' jobs. We have had it worked both ways. [76]

Q. Do you sometimes employ standards checkers from outside the employment rolls of the Company, or is it the normal practice to find them from within?

A. We do it both ways. We would prefer to get them from the people that were in our employ.

Q. In what places do you look for a standards checker in your employment rolls, or among your employees?

A. We don't look any particular place. We are looking for qualifications of the man.

Q. Well, I mean any production workers?

A. Could be a production worker, yes, indeed.

Q. Who might show an aptitude?

A. Yes, indeed. We have had several that have made excellent checkers.

Q. Does that apply to clerks, too?

A. That applies to clerks also. It is the Company policy to promote from within.

Q. Does the plant checker, in any respect, supervise. Excuse me, does the standards checker, in any respect, have any supervisory function?

A. I could not define any of his functions as being supervisory.

Q. What is his relationship to grievances?

A. A standards checker would participate in grievance procedures to the extent of being called upon to recheck information [77] that he had put down on the standard sheet. It is not an uncommon

(Testimony of Francis Stewart Sigler.)

occurrence that workmen, operators, production people, would request the data to question the accuracy of production data that entered into their incentive pay. There, the standards checkers' function is to bring that sheet to the foreman and review it with him for possible error. As such, he participates in furnishing information.

Q. Does he, or does he not, participate in an actual conference on a grievance with the employee that claims a grievance? A. He does not.

Q. What happens when a standards checker is ill for two or three days?

A. He would normally be replaced by the head checker.

The Hearing Officer: I have no further questions.

Mr. Scully?

Q. (By Mr. Scully): You mentioned that, from a promotional standpoint, you would sometimes use a production employee as a clerk or a standards Checker.

I ask you if it is not true that Standards Checkers and clerks have been transferred to production work? A. Yes, that has also been true.

Q. Then is it not true that many classifications of production employees pay a higher pay than a standards checker or plant clerk?

A. Will you restate that, please, to be sure I hear you? [78]

Q. I say, is it not true that certain production employees receive more money than standards checkers and plant clerks?

(Testimony of Francis Stewart Sigler.)

A. Yes, that is true.

Q. And with respect to foremen, is it not true that you have promoted production employees to foremen without them ever being standards checkers or plant clerks? A. That is true.

Q. So that there is no fixed line of promotion?

A. There is no fixed line of promotion, no, sir.

Mr. Scully: That is all.

Hearing Officer: Mr. Bussman?

Mr. Bussman: I have no questions.

Hearing Officer: No more questions?

Mr. Scully: No more.

Hearing Officer: Thank you very much, Mr. Sigler. You are excused.

* * *

Received January 31, 1955. [79]

In the United States Court of Appeals
for the Ninth Circuit
No. 15051

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

SWIFT & COMPANY,
Respondent.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section

102.84, Rules and Regulations of the National Labor Relations Board—Series 6, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of proceedings had before said Board, entitled, "In the Matter of Swift & Company, Employer, and Local 508, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, Petitioners," Case No. 20-RC-2695; and "Swift & Company and Local 508, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL," Case No. 20-CA-1110 before said Board, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said proceedings were entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

Case No. 20-RC-2695

1. Stenographic transcript of testimony taken before Hearing Officer M. C. Dempster on January 19, 1955, together with all exhibits introduced in evidence.

2. Decision and Direction of election issued by the Regional Director on March 3, 1955.

3. Tally of Ballots issued by the Regional Director on March 18, 1955.

4. Certification of Representatives issued by the Regional Director on March 28, 1955.

Case No. 20-CA-1110

5. Copy of charge filed by Local 508, Amalgamated Meat Cutters and Butcher Workmen of North America on June 13, 1955, together with affidavit of service thereof.

6. Complaint and notice of hearing issued by the National Labor Relations Board on August 3, 1955, together with affidavit of service thereof.

7. Respondent's answer sworn to on August 10, 1955.

8. Stipulation dated August 18, 1955, among Respondent, General Counsel and Charging Party waiving hearing, the issuance of intermediate report and recommended order, filing of exceptions and oral argument before the Board, and providing for the issuance of a Decision and Order by the Board.

9. Copy of Order approving stipulation and transferring case to the Board issued by the National Labor Relations Board on August 25, 1955, together with affidavit of Service and United States Post Office return receipts thereof.

10. Copy of Decision and Order issued by the National Labor Relations Board on November 10, 1955, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto

set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 29th day of February, 1956.

/s/ OGDEN W. FIELDS,
Acting Executive Secretary,

[Seal] NATIONAL LABOR
RELATIONS BOARD.

[Endorsed]: No. 15051. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Swift & Company, Respondent. Transcript of Record. Petition for Enforcement of an Order of the National Labor Relations Board.

Filed March 1, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SWIFT & COMPANY,

Respondent.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, Swift & Company, its officers, agents, successors and assigns. The proceedings resulting in said order are known upon the records of the Board as "In the Matter of Swift & Company, Employer, and Local 508, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, Petitioner, Case No. 20-RC-2695"; and "Swift & Company and Local 508, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, Case No. 20-CA-1110."

In support of this petition the Board respectfully shows:

(1) Respondent is an Illinois corporation engaged in business in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on November 10, 1955, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its officers, agents, successors and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree

enforcing in whole said Order of the Board, and requiring Respondent, its officers, agents, successors and assigns, to comply therewith.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel

NATIONAL LABOR
RELATIONS BOARD.

Dated at Washington, D. C., this 29th day of February, 1956.

[Endorsed]: Filed March 1, 1956.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINT RELIED UPON BY THE BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, petitioner herein, pursuant to Rule 17 (6) of the rules of this Court, files this statement of the point upon which it intends to rely in the above-entitled proceeding and this designation of parts of the record necessary for consideration thereof:

I.

Statement of the Point

The Board did not act arbitrarily or capriciously in determining that respondent's plant clerks and

standards checkers constitute a unit appropriate for for the purposes of collective bargaining.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel,

NATIONAL LABOR
RELATIONS BOARD.

Dated at Washington, D. C., this 29th day of February, 1956.

[Endorsed]: Filed March 1, 1956.

[Title of Court of Appeals and Cause.]

ANSWER TO PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals, for the Ninth Circuit:

Respondent, for its answer to the Petition of the National Labor Relations Board for enforcement of its order made in a proceeding before said Board entitled "In the Matter of Swift & Company, Employer, and Local 508, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, Petitioner, Case No. 20-CA-1110," admits, denies and alleges:

1. Respondent admits the allegations of paragraph (1) of the Petition.

2. Respondent admits that findings of fact, conclusions of law and an order were made and served as alleged in paragraph (2) of the Petition but alleges that the findings of fact upon which such order was made are not supported by any substantial evidence and are contrary to the evidence in that the Board erroneously determined that the plant clerks and standards checkers who are the subject of said proceedings are not supervisory, managerial or confidential employees and alleges that the order was arbitrary, capricious and contrary to law in that the Board's order requires respondent to bargain collectively with a representative of said employees.

Wherefore, respondent prays this Honorable Court to deny enforcement of the Board's order, to set the same aside, and for such other relief as may seem proper to this Court.

/s/ MOSES LASKY,

/s/ MARION B. PLANT,

/s/ BAILEY LANG,

Attorneys for Respondent.

[Endorsed]: Filed March 26, 1956.

No. 15051

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SWIFT & COMPANY, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

AUTHORITIES CITED

Cases:

Statutes:

Statutes—Continued

Miscellaneous:

In the United States Court of Appeals
for the Ninth Circuit

No. 15051

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SWIFT & COMPANY, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*),[1] for enforcement of its order (R. 31-34) issued on November 10, 1955, against Swift & Company. The Board's decision and order are reported at 114 NLRB No. 146 (R. 23-34). This Court has jurisdiction of the proceeding, the unfair labor practice having occurred at Swift's plant located in South San Francisco, Cali-

[1] The pertinent statutory provisions are printed in the Appendix, *infra*, pp. 18-22.

fornia, where Swift is engaged in slaughtering, handling and dressing livestock, and in selling meat and related products which it ships in interstate commerce (R. 25-26; 14-15, 36).[2]

STATEMENT OF THE CASE

I

The Board's Findings of Fact

Respondent admittedly refused to bargain with the Union,[3] certified by the Board as the exclusive bargaining representative of respondent's plant clerks and standards checkers, after a majority of these employees selected the Union pursuant to representation proceedings under Section 9 of the Act (R. 24, 26-27, 3-13, 16-23). In defense of its refusal, respondent contended before the Board that a unit composed of plant clerks and standards checkers was not appropriate for the purposes of collective bargaining because these employees are closely related to management, as supervisors, management representatives, or as confidential employees, and therefore are not entitled to engage in collective bargaining under the Act even in a unit composed solely of such employees (R. 24, 27-28; 8-9, n. 1). The pertinent facts respecting this defense, rejected by the Board, may be summarized as follows:

The meat packing plant of the Company, located in South San Francisco, California, has approximately

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[2] Where in a series of references a semicolon appears, record references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

[3] Local 508, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL.

750 employees (R. 41). The plant consists of about 30 departments, each supervised by a foreman, who, in turn, is responsible to the Plant Superintendent in charge of the operation of the entire plant (R. 39-42, 45-46, 55-56, 65). Different labor organizations represent the electricians, drivers, boiler and engine room employees; the Union involved in this case represents the production employees (R. 37-39). In the representation proceedings with which we are here concerned the Union sought certification as the representative of the 12 plant clerks and 5 standards checkers, who were not represented by any other organization (R. 24, 26-27; 5, 8, 11, 41-42, 50).

A. *The plant clerks*

Unlike the clerical employees working in the Plant Superintendent's office and in the Commercial Office, located in buildings apart from the plant, the 12 plant clerks work in the 12 offices located inside the plant (R. 8, 28; 41-42, 53-54, 56-58, 65-66). In the performance of their clerical duties, the plant clerks are immediately supervised by the respective foremen to whose departments they are assigned (R. 8, 28; 45, 46). Some of the plant clerks work for a number of foremen, although most of the clerks remain in one office where they perform their duties occupying a desk adjacent to, or jointly with, the foreman whose office they share (R. 45-46, 79).

The primary duties of the plant clerks concern the maintenance of a variety of records for their respective departments relating to production, shipment, and costs. On the stock record books the clerks enter the quantity and location of the product being cured and

date the product is cured (R. 8; 42, 73). They prepare departmental records and reports concerning volume of production, supply, inventory, cost data, transfer of products in and out of the department, volume of shipment, and the number of hours worked by the employees (R. 8; 42-44, 81-82, 86-89). In addition, using the cost information supplied by the general business office, the Superintendent's office, and the Chief Engineer, the plant clerks fill out the weekly cost reports for their respective departments which show, among other things, the cost of the supplies, labor costs, steam and power costs, cost of repairs, and overhead costs, including sales data (R. 8; 42, 87-87). Finally, the clerks prepare the employees' vacation slips, which are sent to the timekeeper for the computation of vacation pay (R. 44, 64, 81-82).

Aside from these purely clerical tasks, the plant clerks weigh the products, manipulating the scale from inside the plant office, after the products are placed on the scale by the production employees (R. 80). They instruct the employees where to place, and when to move, certain products in the course of the processing (R. 8; 43, 80-81, 99). In the brief absences of the foreman, the plant clerks, as do some of the production employees, assume responsibility in the department for short intervals (R. 8; 47, 82). However, the plant clerks have no power to hire, discharge, assign or rate employees, or even make effective recommendations concerning the employees to the foreman (R. 8-9, 28; 100-101). And although the clerks may compile data for use by their respective foremen in the handling of employee grievances when so instructed by the foremen, the grievances are resolved by the foreman and the ag-

grieved employee without the presence of the plant clerk (R. 8, 9, 28; 48-49, 101).

The plant clerks are paid weekly salaries, are given work clothes, and share a locker room with the foreman (R. 47, 48, 83). They, like the production workers, punch the time clock of the department (R. 82-83), and, like the other salaried employees, the plant clerks enjoy the same type of health and welfare benefits enjoyed by the production employees (R. 48, 76-78). Neither plant clerks nor standards checkers can normally expect to be promoted to foreman, as there is no fixed line of promotion and production workers are frequently promoted to these supervisory positions (R. 104). Both plant clerks and standard checkers receive less pay than certain production workers and have on occasion been transferred from salaried positions to work as production employees (R. 101-102, 103-104).

B. *The standards checkers*

The 5 standards checkers employed at the plant are closely allied to the plant clerks by the similarity of their duties and their working conditions. Like the plant clerks, the standards checkers perform clerical work in the plant offices under the immediate supervision of the foremen, are furnished work clothes, and are assigned locker room space apart from the hourly paid employees (R. 9; 53-54, 58, 64-65). Similarly, the standards checkers are salaried, rather than hourly-paid employees, report for work by punching a time-clock, and enjoy the identical vacation, health and other welfare benefits to which the plant clerks are entitled (R. 54, 64, 74-77). Although the standards checkers work closely with the foremen, they may work in more than one plant office, exercise no supervisory

duties, and have been transferred to production work (R. 9, 28; 66, 79).

The job of the standards checkers concerns the computation of incentive earnings of the production employees (R. 9; 49-50). The standards checkers are furnished standards books which contain the variable factors, predetermined by time and motion studies, respecting the various jobs of the different departments (R. 9; 49-50, 62-63). Each day, in consultation with the foreman and the plant clerk, the standards checkers ascertain the amount produced the previous day, whether any abnormal factors affected the previous day's production and how many hours each employee worked on operations subject to standards (R. 9; 49-51, 52, 66-67, 72-74, 92-98). The checker then enters this information upon the standards checking sheets supplied by the Superintendent's office for the various jobs, together with the variable factors which the standards checker determines are applicable (R. 9; 49-52, 58-61, 67). After all the production data is entered, the standards checker hands the standards checking sheet to the comptometer operators for computation of the employees' standard hours on premium or incentive pay (R. 9; 50, 68-69). After the sheet is examined by the foreman for accuracy, the standards checker takes the sheet directly to the head standards checker or his assistant (R. 50, 58, 69-72, 78-79).

A day or so after the work is performed, the incentive earnings of the employees are computed and posted in the plant (R. 52, 63-64). In case an employee questions the accuracy of the computation or the appropriateness of the standards selected by the standards checker, the standards checking sheet is returned to the plant department for reexamination by the standards checker, or is reviewed by the head standards checker and the

foreman (R. 9; 52-53, 95, 102-103). The standards checker does not otherwise participate in the grievance procedure (R. 9; 102-103).

II

The Board's Decision and Order

Upon the foregoing facts the Board held that "All plant clerks and standards checkers at the * * * plant, excluding all other employees, guards, and supervisors defined in the Act" constituted a unit appropriate for the purposes of collective bargaining (R. 8, 12, 16-18, 26-27). In so holding, the Board rejected the Company's contentions that the plant clerks and standards checkers were supervisors, or closely related to management as managerial representatives or confidential employees, and thus ineligible to participate in collective bargaining negotiations (R. 9, 28).

Pursuant to the Board's direction, an election was held among the 16 eligible employees; the Union received 11 of the votes, and was certified on March 28, 1955 (R. 7-12). Nevertheless, the Company, on and after April 27, 1955, rejected the Union's request to enter into bargaining negotiations, alleging that the unit found by the Board was inappropriate (R. 24, 27-28; 18-23). The Board, holding that the Company's admitted refusal to bargain violated Section 8 (a) (5) and (1) of the Act, ordered the Company to cease and desist from refusing to bargain collectively with the Union, or in any like manner interfering with the efforts of the Union to bargain collectively on behalf of the employees (R. 28-31). Affirmatively, the order requires the Company, upon request, to bargain collectively with the Union and to post appropriate notices (R. 31-34).

ARGUMENT

The Bargaining Unit of Plant Clerks and Standards Checkers Was an Appropriate Unit

Respondent having admittedly refused to bargain with the Union certified by the Board, the first question before this Court is whether the Board has acted arbitrarily or capriciously in determining that the plant clerks and standards checkers constitute an appropriate bargaining unit. *Foreman & Clark, Inc.* v. *N.L.R.B.*, 215 F. 2d 396, 405-406 (C.A. 9), certiorari denied, 348 U. S. 887, and cases there cited. We submit that the undisputed facts, summarized above, establish that the plant clerks and standards checkers are so closely allied, by virtue of their duties and working conditions, as to constitute a cohesive unit appropriate for the purposes of collective bargaining under the Act. See *N.L.R.B.* v. *Armour & Co.*, 154 F. 2d 570, 575, 576 (C.A. 10), certiorari denied, 329 U. S. 732, quoted with approval in *Foreman & Clark, supra;* see also *N.L.R.B.* v. *Swift & Co.*, 162 F. 2d 575, 580-581 (C.A. 3), certiorari denied, 332 U. S. 791; *N.L.R.B.* v. *Continental Oil Co.*, 179 F. 2d 552, 554-555 (C.A. 10). Indeed, throughout this proceeding, the similarity of the employees' interests and conditions of employment are repeatedly stressed (R. 48, 50-54, 58, 72-77, 82, 101-104).

The Company's chief attack upon the Board's determination, however, is that the plant clerks and standards checkers are disqualified from representation by any labor organization for the purposes of engaging in collective bargaining because of the supervisory, managerial, or confidential nature of their responsibilities as employees of the Company.[4]

[4] Respondent also contended before the Board that the Union could not represent the plant clerks and standards checkers be-

Similar contentions have been previously examined and found wanting in *N.L.R.B.* v. *Armour & Co.*, 154 F. 2d 570 (C.A. 10), certiorari denied, 329 U. S. 732, a case which we submit is indistinguishable from the case at bar, and in *N.L.R.B.* v. *Swift & Co.*, 162 F. 2d 575 (C.A. 3), certiorari denied, 332 U. S. 791, a case involving another plant of the respondent herein.[5]

In *N.L.R.B.* v. *Armour & Co., supra*, as here, the employer—who was engaged in the same type of large-scale meat processing and packing—contended that plant clerks and checkers were part of management and therefore not entitled to representation for collec-

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cause the Union also represented the Company's production employees. In support of this contention, respondent adverted merely to the fact that such employees, in the South San Francisco plant and in the Company's other plants, have never been considered as part of a unit composed of production employees. The short answer, of course, is that the Board's certification does not place the clerks and checkers in the production unit for purposes of collective bargaining, but establishes a separate unit for them (*supra*, p. 7). In any event, similar contentions have been raised in virtually identical situations and have been rejected by the courts. *N.L.R.B.* v. *Swift & Co.*, 162 F. 2d 575, 580-581 (C.A. 3), certiorari denied, 332 U.S. 791; *N.L.R.B.* v. *Armour & Co.*, 154 F. 2d 570, 572, 575 (C.A. 10), certiorari denied, 329 U.S. 732.

[5] Although these cases arose under the original Act, nothing in the 1947 amendments detracts from the force of their reasoning, which is fully explained below (pp. 14-17). Even with respect to respondent's contentions that the clerks and checkers are supervisors as defined in Section 2 (11) of the Act, a provision not contained in the original Act, the reasoning of these cases is relevant. For, in approving a definition of "supervisor," Congress intended to reach "the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action" and "adopted the test which the Board itself has made" S. Rept. No. 105, 80th Cong., 1st Sess., p. 4; H. Conf. Rept. No. 510, 80th Cong., 1st Sess., p. 35 (Legislative History of the Labor Management Relations Act, 1947 (Govt. Print. off. 1948), hereinafter cited as "Leg. Hist.", Vol. I, pp. 410, 539).

tive bargaining purposes under the Act. 154 F. 2d at 572, 574, 576-577. The duties of the plant clerks employed by Armour were broader than those of the clerks employed by the Company in the instant case, for Armour's clerks had the responsibility of directing test runs of a group of employees where no regular foreman was present, of maintaining employment records of the workers, and of notifying the foreman which employees were to be laid off or hired under the seniority rules. *Id.* at 573. Similarly the checkers in Armour had greater authority than the Company's checkers, since the former examined the plant clerks' reports for errors, made spot checks of the performance of the various operations, both as to method and the number of men employed, and even advised the foreman of deviations from job descriptions or standards and the time allowances for a day's work. *Id.* at 576-577. Nevertheless, the court there sustained the Board's finding that both these groups of workers were employees entitled to full protection of the Act, and that Armour was compelled to bargain with their chosen representative. Similarly, the court in *N.L.R.B.* v. *Swift & Co.,* 162 F. 2d at 577, 580-581, held that the plant clerks and standards checkers were not supervisors, and that the Board could properly include them in a unit with other clerks, even though a coaffiliate of their union represented the production employees.

In the light of these judicial precedents, we turn now to a more particularized consideration of the Company's contentions concerning the validity of the Board's determination respecting these two groups of employees.

A. *The plant clerks and standards checkers are not supervisors within the meaning of Section 2 (11) of the Act*

Although respondent urged before the Board that the standards checkers were given supervisory duties, at the hearing in the representation proceeding the plant superintendent conceded that he "could not define any of [the standards checkers'] functions as being supervisory" (R. 102). Even apart from this admission respondent's assertion that these employees have supervisory responsibilities is unsupported by the record.

Respondent urged that because the duties of the standards checkers affect the compensation earned by the employees, they have the authority to "reward" the employees within the meaning of Section 2 (11) of the Act, quoted *infra*, pp. 18-19. Respondent's argument not only involves a distortion in the plain meaning of the word "reward,"[6] but would make supervisors of every employee whose functions might affect the compensation of other employees. The legislative history of Section 2 (11) conclusively demonstrates that Congress did not intend to exclude from the benefits of the Act all persons whose duties affected the earnings

[6] Particularly applicable here is the familiar canon of statutory construction that "legislation, when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." *Addison* v. *Holly Hill Fruit Co.*, 322 U.S. 607, 618; *N.L.R.B.* v. *Coca-Cola Bottling Co.*, 350 U.S. 264, 268-269; *Helvering* v. *Hutchings*, 312 U.S. 393, 396. See also *N.L.R.B.* v. *North Carolina Granite Corp.*, 201 F. 2d 469, 470 (C.A. 4), where the court held that an employee who kept the time of himself and two other employees, thus affecting their compensation, did not have authority to "reward" these employees so as to make him a supervisor within the meaning of the Act.

of other employees. Under the House bill, it was proposed to exclude, as supervisors, "personnel who fix the amount of wages earned by other employees, such as inspectors, checkers, weigh-masters, and time-study personnel." H. Conf. Rept. No. 510, 80th Cong., 1st Sess., p. 35; Section 2 (12) (A) of H.R. 3020; 93 Cong. Rec. 4138, 6442. (Leg. Hist., Vol. I, pp. 40-41, 539, Vol. II, pp. 1068, 1537). In conference, however, the House version was rejected, and the conferees decided to restrict the term "supervisor" to individuals "generally regarded as foremen and persons of like or higher rank" as in the Senate version. *Ibid.*

In any event, the undisputed evidence previously summarized (pp. 5-7), establishes that the checkers' duties do not involve, as Section 2 (11) of the Act requires, the exercise of "independent judgment" but were, merely of a "routine or clerical nature." Thus, their very functions relate to the computation of the production employees' earnings by selecting the factors which are enumerated in the standards book. Before selecting the factors to be entered on the checking sheet, however, the standards checker consults with the foreman and the plant clerk, and, again, before transmitting the sheet to the standards department, the sheet is examined by the foreman for accuracy. Even after transmission, the standards checking sheet is subject to review by the head standards checker or his assistant, as a matter of routine, and, if an employee questions the computation of his pay, the standards checking sheet will be reviewed once more. In short, a standards checker is, at most, "a trusted employee with intelligence enough to gather information for the management's action" but lacking any authority to "exercise any judgment as to policy or to hire or fire, demote, or

promote any employee." *N.L.R.B.* v. *Osbrink*, 218 F. 2d 341, 344 (C.A. 9), certiorari denied, 349 U. S. 928. See also *N.L.R.B.* v. *Parma Water Lifter Co.*, 211 F. 2d 258, 261 (C.A. 9), certiorari denied, 348 U. S. 829.

The duties of the plant clerks, too, are essentially those of a "trusted employee with intelligence enough to gather information for the management's action" but without authority to exercise judgment as to policy or employment. Respondent, however, relied upon the fact that the plant clerks instruct the production employees with respect to the handling of products in the course of processing, supervise the department in the absence of the foreman, and may discuss the qualification of production employees with the foremen. At most, we submit, respondent's argument establishes that the plant clerks possess "minor supervisory duties" but "were not intended to be excluded from the coverage of the Act." *N.L.R.B.* v. *Quincy Steel Casting Co.*, 200 F. 2d 293, 296 (C.A. 1). See also *N.L.R.B.* v. *North Carolina Granite Corp.*, 201 F. 2d 369 (C.A. 4); Sen. Rept. No. 105, 80th Cong., 1st Sess., pp. 4, 19; 93 Cong. Rec. 3836, 4677-4678 (I Leg. Hist. 410, 425; II Leg. Hist. 1009, 1303).

Thus, although the plant clerk may give his opinion to the foreman with respect to a particular employee, the plant superintendent testified that "The foreman makes the decisions, that is his job" even though, of course, the foreman "might value" the opinion of the plant clerk (R. 100, 101). This falls far short of the requisite power of a supervisor to "effectively recommend" action with respect to an employee. Similarly, although the plant clerk exercises the supervisory powers of the foreman during the foreman's temporary absence, for short periods, "the grant of power to ex-

ercise a supervisory function only spasmodically and infrequently" cannot make a " 'supervisor' out of a rank and file employee." *N.L.R.B.* v. *Leland-Gifford Co.,* 200 F. 2d 620, 625 (C.A. 1); see also *N.L.R.B.* v. *Quincy Steel Casting Co.,* 200 F. 2d 293, 296 (C.A. 1); *NL.R.B.* v. *Whitin Machine Works,* 204 F. 2d 883 (C.A. 1). Especially is this true where, as here, production employees also relieve the supervisors (R. 82). And, finally, the instructions given the production employees regarding the handling of products in the course of processing were merely routine directions similar to those given by the molder in *N.L.R.B.* v. *Quincy Steel Casting Co.,* 200 F. 2d 293, 296 (C.A. 1), by the clerk in *N.L.R.B.* v. *Whitin Machine Works,* 204 F. 2d 883, 886 (C.A. 1), and by the carpenter in *N.L.R.B.* v. *North Carolina Granite Corp,* 201 F. 2d 469, 470 (C.A. 4), all of whom were held to be employees, not "supervisors," within the meaning of the Act.

B. *The plant clerks and standards checkers have no duties as confidential employees or representatives of management in the field of labor relations*

In addition to the contention that the plant clerks and standards checkers exercise supervisory duties within the meaning of Section 2 (11) of the Act, respondent argued that these employees are so closely integrated with management as to be confidential employees and managerial representatives who, under Board established policies, should be excluded from the benefits of collective bargaining. In this connection respondent adverted to the fact that the employees have access to financial and production data, employment records, and information concerning employee grievances.

At the outset, it is clear that respondent's position does not mean that the cost, production, or other data, available to the plant clerks and standards checkers is not available to the other employees, but only that the Company did not want this information disclosed to competitors. Thus, at the hearing, although testifying that the Company wanted the records restricted to supervisory personnel, the plant superintendent admitted that the cost records are not kept in a vault, and explained, finally, "I stated that we would certainly not want our competitors to know our costs or our production data. To me that is the meaning of confidential" (R. 84, 90, 91-92). Moreover, the plant superintendent testified that "any employee" has the "right" to ask what the standards are on any job to which he is assigned; that the rates of pay for production workers are "available for all employees" (R. 84); that the employees' earnings are posted in the plant (R. 52); and that time-study data are made available to union representatives, for the purposes of collective bargaining (R. 84-85).

From management's own view, therefore, whatever confidential aspects are involved in the duties of plant clerks and standards checkers relate not to the personnel problems of the Company, but to the harmful effects of disclosure to business competitors. Such duties do not disqualify these employees from the right to engage in collective bargaining, as was recognized in *N.L.R.B.* v. *Armour & Co.*, 154 F. 2d 570, 574 (C.A. 10), certiorari denied, 329 U. S. 732, where the court stated in rejecting the same contention urged by respondent's competitor with respect to the employees performing the same work as those here:

> Certainly, exclusion from the benefits of the Act is not the price of honest and faithful service. It is true that the knowledge which the plant clerks obtain is of a highly confidential nature and that its disclosure to competitors of Armour might result in injury to Armour. Armour may require, as a condition of employment, that the plant clerks treat such information as confidential.

See also *Associated Press* v. *N.L.R.B.*, 301 U. S. 103, 132; *B. F. Goodrich Co.* 115 NLRB No. 103 (37 LRRM 1383).[7]

These same considerations demonstrate that the faithful performance of these employees' duties in connection with the computation of earnings or in connection with the adjustment of grievances is in no way incompatible with their being represented by a collective bargaining agent. As already noted (*supra*, pp. 4-5, 7), neither the plant clerks nor the standards checkers actually participate in the conference, which

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[7] Contrary to respondent's contention before the Board, there is nothing in the Board's decision in *Ohio Ferro Alloys Corporation*, 107 NLRB 504, requiring a different conclusion. In that case, the two individuals the Board excluded from the bargaining unit as "confidential employees" did clerical and stenographic work for the plant superintendent in charge of labor relations, including handling correspondence between the superintendent and officers of the corporation. *Ibid.* The Board thus concluded that it was "clear on the record that these two individuals in the course of their regular duties actively handled confidential materials relating to labor relations." *Id.* at 505. In the case at bar, however, the plant clerks and standards checkers have no comparable duties with respect to labor relations, and have no access to any confidential matters, even in connection with grievances, which concern labor relations decisions. See *Seventeenth Annual Report of the National Labor Relations Board* (Govt. Print. Off., 1953) pp. 91-92; *Sixteenth Annual Report* (Govt. Print. Off., 1952) pp. 117-119.

is normally handled directly between the foreman and the aggrieved employee. The role played by these employees is the quite closely restricted one of gathering information, or rechecking computations, for use by the foreman in adjusting the grievance. Should these employees fail to perform these duties properly, or should the plant checker neglect to select the proper standards in computing incentive earnings of the other employees, the Company has the effective remedy of disciplining or discharging these employees. Exclusion from the benefits of the Act is neither required nor justified. See the *Armour*, *Associated Press*, and *Goodrich* cases cited immediately above.

CONCLUSION

It is respectfully submitted that the Board properly concluded that none of respondent's grounds for refusing to honor the Board's certification of the Union as the bargaining agent of the plant clerks and standards checkers had merit and that a decree should issue enforcing the Board's order in full.

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JUNE, 1956.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151 *et seq.*), are as follows:

DEFINITIONS

Sec. 2. When used in this Act—

* * * * *

(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, * * *, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual have the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing th exercise of such authority is not of a

merely routine or clerical nature, but requires the use of independent judgment.

* * * * *

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also, have the right to refrain from any or all of such activities * * *.

UNFAIR LABOR PRACITCES

Sec. 8. (a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

REPRESENTATIVES AND ELECTIONS

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of

employment, or other conditions of employment: * * *

(b) The Board shall decide in each case whether in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *

* * * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or an individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in Section 9 (a), * * *

* * * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(d) Whenever an order of the Board made pursuant to Section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (e) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under Section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including

the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

* * *

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No. 15,051

In the

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

SWIFT & COMPANY,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board

Brief For Respondent Swift & Company

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

STATUTES

TEXTS

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Brief For Respondent Swift & Company

STATEMENT OF THE CASE

Following direction by the Board of an election in a bargaining unit comprised of plant clerks and standards checkers at Swift's South San Francisco plant and certification of Local 508, Amalgamated Meat Cutters and Butcher Workmen of America, AFL, as the bargaining representative of employees in that unit, Swift refused to bargain with the Union on the ground that the unit was inappropriate.

In the proceedings before the Board, Swift contended that the standards checkers, as well as the plant clerks, were confidential and managerial employees. We do not press that contention here. However, we do not wish to be understood as conceding that it

lacks merit; Swift believes that its contention was sound and that the Board was wrong in holding otherwise. Our failure to press the contention here results from our recognition of the reluctance of the courts to disturb unit determinations involving exercise by the Board of discretionary powers, and from the fact that in any event the unit is inappropriate as a matter of law because of the supervisorial status of the plant clerks.

We therefore direct the Court's attention solely to the plant clerks. As just indicated, it is our position that they are supervisory employees and, therefore, that their inclusion in the unit rendered the unit inappropriate as a matter of law.[1]

The Evidence.

The evidence bearing upon the propriety of the unit consisted entirely of the testimony of Francis S. Sigler, plant superintendent, taken at the hearing in the representation proceedings.[2] There were, therefore, no evidentiary conflicts to be resolved.

The plant is divided into approximately thirty departments (R. 55), each headed by a foreman (R. 41). The departments vary in size. In the smaller departments, the foreman does his own clerical work (R. 47). In the larger departments the foreman is assisted by a plant clerk who does his clerical work and performs various other functions which in the smaller departments are performed by the foreman himself (R. 42-43, 46-47). Depending on

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1. The propriety of the Board's unit determination in the representation case is, of course, subject to review in the instant proceeding. *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146.

2. Section 9(d) of the Act provides that whenever an order of the Board relative to an alleged unfair labor practice is based in whole or in part upon facts certified in a representation proceeding, the record in the representation proceeding shall be part of the record filed with the court in any proceeding to enforce, modify or set aside the order relative to the unfair labor practice. In the present case, the parties stipulated before the Board that the evidence taken in the representation case might be deemed a part of the record in the unfair labor practice proceeding (R. 15, 17).

the size of the departments, a clerk may be assigned to a single department or may be assigned to two or more (R. 79).

The foremen have their desks in plant offices, of which there are twelve (R. 66). There likewise are twelve plant clerks (R. 12). A clerk who assists only one foreman may share a large, double desk with that foreman; otherwise he has a desk of his own adjacent to the desks of the foremen whom he assists (R. 45).

Contrasted with the thirty some-odd foremen and twelve plant clerks, there are a total of 750 employees in the plant (R. 41).

The foreman and his clerk are "a very close team" (R. 100). As above indicated, the clerk not only attends to the clerical work (R. 46), but assists the foreman in various other respects; of particular significance in the present case is the fact that he directs other employees in the performance of certain production operations (R. 42, 43, 81, 99), and that he acts in the foreman's place when the foreman is temporarily absent from the department (R. 47, 82).

Typical of the activities of a plant clerk in directing the work of other employees are the activities of the clerk in the sweet pickle curing cellar, a representative department (R. 42). The products come into the department in barrels (tierces), are weighed and are then trucked to the cellar (R. 80-81). In curing the meats, it is necessary to "overhaul" the tierces from time to time—that is, to move the barrels so as to stir up the meat and cure it properly (R. 43, 81); this "is the most important thing in the production of that particular product" (R. 81). After weighing the incoming products, the plant clerk tells the workmen what to do with them —i.e., to put them in a certain bin in a "certain storage room" or to take them to the "smoke house" or to "dry pack" (R. 42, 80, 99). More important, he directs the overhauling operation, telling the men which barrels to move (not all are moved at the same time (R. 43, 81)) and how far to move them (R. 43).

When we say that the clerk acts in the foreman's place during the latter's absences from the department, we mean that the clerk

"take[s] over the supervision of the department." (R. 47) The occasions for his doing so are not infrequent, but are "many" (ibid.). There are also some production employees who are called upon to relieve supervisors, and who are temporarily upgraded while so doing (R. 82) but it does not appear that this is done where a clerk is available.

The fact that the clerks, like the foremen, are salaried, that they share a locker room with the foremen, and that they are treated in other respects like the foremen, has been touched upon in the Board's brief. At page 5 of its brief it is stated that "Neither plant clerks nor standards checkers can normally expect to be promoted to foreman." Insofar as this statement implies that it is not normal for a plant clerk to be promoted to foreman, it is misleading. It is true that there is no fixed line of progression which excludes the possibility of a production worker being promoted directly to a foreman's job (R. 104). But the fact is that a large percentage of the foremen were formerly plant clerks or standards checkers (R. 54). Mr. Sigler, the plant superintendent, was himself, at one time, a plant clerk (R. 42).

The Board's Findings

In its Decision and Direction of Election in the representation proceedings, the Board made the following findings as to the duties of plant clerks (R. 8-9):

> "The plant clerks work with foremen in plant department offices. They maintain department records pertaining to costs, production time spent by employees in production processes, and inventory. When necessary, they also compile data for use by the foremen in processing grievances. In addition, *they tell employees where to place and when to move certain products in the course of processing, and they take charge of the department for short intervals when a foreman is absent.* However, they have no power to hire or discharge or effectively recommend such action, nor do they

handle grievances. Their assignment of work is routine." (Emphasis supplied).

It will be noted that the Board found, in accordance with the evidence above summarized (a) that the plant clerks "tell employees where to place and when to move certain products in the course of processing," and (b) that "they take charge of the department for short intervals when a foreman is absent." The Board nevertheless concluded that they were employees within the meaning of the Act—not supervisors (R. 9). That conclusion apparently was grounded upon the concluding statement above quoted (the basis of which is unknown to us) that "Their assignment of work is routine."

THE QUESTION

The question is whether the plant clerks are supervisors. As we shall see, the answer to that question depends upon whether the evidence supports the Board's finding that the clerk's "assignment of work is routine."

If the plant clerks are supervisors, as we submit they are, then the unit was inappropriate and Swift was not guilty of a refusal to bargain with the representative of its employees in an appropriate unit.

ARGUMENT

The evidence shows, and the Board has found, that the plant clerk directs the work of other employees and that he has charge of the department during the foreman's absences. He therefore is a supervisor unless it be true, as the Board has found, that his "assignment of work is routine." The fact is that this finding is contrary to the evidence and that enforcement of the Board's order therefore should be denied. To elaborate:

I. The fact that the plant clerks are authorized to direct other employees suffices to characterize them as supervisors; it is immaterial that they are without authority to hire, promote, discharge or discipline, or to effectively recommend such action.

The National Labor Relations Act, while requiring bargaining with employees, excludes supervisors in defining the term "employee" (Sec. 2(3)), and provides that "no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining" (Sec. 14(a)). It defines the term "supervisor" as follows (Sec. 2(11)):

> "(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, *or responsibility to direct them,* or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." (Emphasis supplied).

We have italicized the phrase "or responsibility to direct them" in the foregoing definition because it was inserted by amendment on the Senate floor when the Taft-Hartley Act was in the process of enactment in order to characterize as supervisorial a function which the Board had not theretofore regarded as such, and because it is the phrase which is controlling of the instant case. During the period from 1943, when the Board held in *Matter of Maryland Dry Dock Company,* 49 N.L.R.B. 733, that a unit embracing supervisors having certain types of authority was not appropriate for collective bargaining, and 1945, when in *Matter of Packard Motor Company,* 61 N.L.R.B. 4, the Board reversed itself, the Board defined the supervisors to be excluded from bargaining units as:

> "* * * supervisory employees who have authority to hire, promote, discharge, discipline or otherwise effect changes

in the status of employees, or effectively recommend such action."

See, e.g.,

Matter of Swift & Co., 51 N.L.R.B. 24, 26;

Matter of Armour & Co. of Delaware, 51 N.L.R.B. 28, 30.

The definition of supervisor in the Senate Bill as originally reported[3] did not contain the phrase which we have italicized above in the provision finally enacted, but was substantially the same as the definition which had been employed by the Board and which we have just quoted. It was to the definition contained in the bill as originally reported that the Senate Report referred when it said, in the language quoted in the Board's brief (p. 9, n. 5), that the bill "adopted the test which the Board itself has made."[4] Thereafter the bill was amended on the Senate floor at the instance of Senator Flanders to insert the phrase italicized above and thus, in the words of Senator Flanders, to embrace "the basic act of supervising." 93 Congressional Record 4677-4678 (1947); 2 Leg. Hist. 1303-1304. By reason of that insertion, the Act excludes as a supervisory employee an individual having authority to direct other employees although he has no authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees, or to effectively recommend such action. *N. L. R. B. v. Budd Mfg. Co.* (CA 6), 169 F.2d 571; *Ohio Power Co., v. N. L. R. B.* (CA 6), 176 F.2d 385.

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3. S. 1126; see Legislative History of the Labor Management Relations Act, 1947 (Govt. Print. Off. 1948), hereinafter cited as "Leg. Hist.", Vol. I, pp. 104, 438.

4. The House Conference Report, which the Board also cites, and which dealt with the bill in its final form, did not employ the language quoted in the Board's brief, but stated simply that "The conference agreement, in the definition of 'supervisor', limits such term to those individuals treated as supervisors under the Senate amendment." H. Conf. Rept. No. 510, 80th Cong., 1st Sess., p. 35; see I Leg. Hist., p. 539.

As above noted, the Board has found that the plant clerks "tell employees where to place and when to move certain products in the course of processing, and they take charge of the department for short intervals when a foreman is absent." The Board's further finding that "they have no power to hire or discharge or effectively recommend such action" does not amount to a denial of the existence of supervisorial status, for, as above noted, the definition of supervisor is in the disjunctive, and possession of any one of the qualifications mentioned in the definition places an employee in the supervisory class. *N. L. R. B. v. Budd Mfg. Co.* (CA 6), *Ohio Power Co. v. N. L. R. B.* (CA 6), both *supra.*

While the Board did not find in so many words that the plant clerks have authority "responsibly to direct other employees," it is apparent from the evidence that they do have such authority and the Board so found in substance. Certainly it did not find otherwise. The unconflicting evidence is that the clerk regularly directs other employees in the performance of the most important part of the processing operation and that in the absence of the foreman he takes the latter's place in directing other phases of the work as well. These are the controlling facts.

The Board's brief places its chief reliance on *N. L. R. B. v. Armour & Co.* (CA 10), 154 F.2d 570 and *N. L. R. B. v. Swift & Co.* (CA 3), 162 F.2d 575. Both arose and were decided before amendment of the Act to exclude supervisors, and neither has any bearing on the instant case. The *Armour* case simply upheld the Board in applying its old test of supervisorial status, holding that the employees in question were properly included in the unit because they had "no power to hire, to discharge, to promote or demote, or even to make recommendations in these respects." 154 F.2d at 575. In the *Swift* case, which was decided after the Supreme Court's affirmance of the *Packard Motor Company* decision, the court felt it unnecessary to pass upon the question whether the individuals concerned were supervisors; it held that

whether or not they were supervisors they were "employees" within the meaning of the Act and that the question whether they should be included in the bargaining unit was one for the Board to decide in the exercise of a "broad discretion." 162 F.2d at 580.

II. The Board's finding that the plant clerk's "assignment of work is routine" is contrary to the evidence.

Apparently, the Board based its conclusion that the plant clerks are not supervisors upon its finding that "Their assignment of work is routine." That finding is not justified by anything in the evidence. The statutory requirement that the exercise of supervisorial authority be "not of a merely routine or clerical nature" but that it involve "the use of independent judgment" does not mean that an individual must act without the guidance of detailed instructions, rules or blueprints to qualify as a supervisor. *N.L.R.B. v. Budd Mfg. Co., supra.* Even were the law otherwise, there is no evidence that the plant clerk, in directing the work of others, is an automaton activated by electrical impulses from a set of instructions, rules or blueprints. On the contrary, the evidence clearly indicates that his work involves the use of judgment in directing the placing and movement of products and in dealing with problems arising in the foreman's absence.

The definition of "supervisor" is not to be given a restrictive interpretation. *Ohio Power Co. v. N.L.R.B., supra.* The phrase "responsibility to direct other employees" means simply that the individual must be "answerable for the discharge of a duty or obligation" to direct; responsibility "is implied from power." Ibid., 176 F.2d at 387. Thus, individuals are supervisors though "they carry out production schedules which have been arranged and blueprinted for them and from which they can depart only in minor matters or in emergencies," and although they are guided in everything they do by "established rules and regulations" or by "directions from their own supervisors," it being sufficient that

they exercise discretion in carrying out their orders. *N.L.R.B. v. Budd Mfg. Co., supra.*

An agent assigned the performance of a certain function is presumed to have authority to perform all acts necessary to the performance of that function. *American National Bank of Sapulpa v. Bartlett* (CA 10), 40 F.2d 21; 1 Mecham on Agency (2d ed.), pp. 502-503. It therefore is to be presumed in the absence of evidence to the contrary that an individual having authority to direct the work of other employees has authority to formulate the directions which he thus gives, a process necessarily involving the exercise of judgment. As above noted there is no evidence that the plant clerk was a mere conduit for transmitting orders formulated by a superior. In the absence of such evidence, it is to be presumed that he was authorized to formulate the instructions which he gave and that the exercise of his authority thus involved the exercise of judgment and discretion.

The burden was upon the Board to prove its charge affirmatively and by substantial evidence. *Local No. 3, United Packinghouse Workers v. N.L.R.B.* (CA 8), 210 F.2d 325; *N.L.R.B. v. MacSmith Garment Co.* (CA 5), 203 F.2d 868; *N.L.R.B. v. National Die Casting Co.* (CA 7), 207 F.2d 344; *N.L.R.B. v. Reynolds International Pen Co.* (CA 7), 162 F.2d 680. The burden thus was upon the Board to prove that the bargaining unit in question was appropriate. While Swift may have been under a duty to go forward with evidence of the supervisory status of the plant clerks, that duty was satisfied by the introduction of evidence that the plant clerks are authorized to direct, and do direct, the work of other employees. There being no evidence that they were mere conduits for the transmission of directions formulated by others, the Board's finding that "Their assignment of work is routine" is unsupported by evidence, and its conclusion that they lacked supervisory status is contrary to law.

III. The arguments advanced in the Board's brief are unrelated to either the wording of the Act or the facts of the instant case.

The Board asserts in its brief that persons possessing only "minor supervisory duties" are not supervisors within the meaning of the Act, citing *N.L.R.B. v. Quincy Steel Casting Co.* (CA 1), 200 F.2d 293, and *N.L.R.B. v. North Carolina Granite Corp.* (CA 4), 201 F.2d 469. The *Quincy Steel Casting Co.* decision involved a molder who, working along with another molder, was required to pour hot metal from ladles into molds three or four times a day and who coordinated the efforts of the other molder with his own by telling him "when to start and when to stop pouring." 200 F.2d at 295. The *North Carolina Granite Corp.* decision involved a carpenter who worked as the "lead hand" with two other carpenters in a repair squad. Whether or not the foregoing decisions were sound, the powers and duties of the molder and the carpenter were in no way comparable to those of the plant clerks involved in the present case. As for the statute itself, it does not make supervisory status depend upon whether the supervisory duties are major or "minor." An individual is a supervisor if he has authority "responsibly to direct" the work of others, and he is not deprived of supervisory status by the fact that his authority does not extend or relate to such matters as hiring, promotion, discipline or discharge. The Board's brief seems to suggest that supervisory authority is "minor" and does not confer supervisory status if it is limited to directing the work of others; but the statute clearly provides otherwise.

The Board also argues that supervisory status is not conferred by authority to exercise a supervisory function only "spasmodically and infrequently," citing *N.L.R.B. v. Leland-Gifford Co.* (CA 1), 200 F.2d 620, the *Quincy Steel Casting Co.* decision, *supra,* and *N.L.R.B. v. Whitin Machine Works* (CA 1), 204 F.2d 883. The *Leland-Gifford Co.* decision in fact held that it was the existence of the authority and not the frequency of its exercise that mattered,

and the case therefore was sent back to the Board to reconsider its findings which had denied the existence of supervisorial status. See also *Ohio Power Co. v. N.L.R.B.* (CA 6), 176 F.2d 385. However, we need not debate this abstract question of law, for neither the authority of the plant clerks nor its exercise is limited to "spasmodic" or "infrequent" occasions. The plant clerks are authorized to direct, and do in fact direct, as a regular part of their daily work the processing operations hereinabove mentioned. In addition, they relieve the foremen. The occasions upon which they do this last are not "infrequent" or "spasmodic" but are "many"; but even if such occasions were infrequent, the fact would remain that even when the foremen are present, the plant clerks regularly direct the processing operations hereinabove mentioned, and that it is the sum total of their supervisory authority, and not a single segment of it, that is determinative of their status.

CONCLUSION

The Board's order is erroneous in establishing a bargaining unit which includes supervisors, namely, the plant clerks, and in requiring respondent to bargain with the representative of such a unit. Hence the Board's petition for enforcement of its order should be denied and the order itself should be set aside.

Dated: August 13, 1956.

Respectfully submitted,

MARION B. PLANT,
MOSES LASKY,
BAILEY LANG,
BROBECK, PHLEGER & HARRISON
Attorneys for Respondent
Swift & Company

No. 15052

United States
Court of Appeals
for the Ninth Circuit

See Vol. 2965

EMPIRE PRINTING COMPANY, a Corporation,

Appellant,

vs.

HENRY RODEN, ERNEST GRUENING and FRANK A. METCALF,

Appellees.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 354)

Appeal from the District Court for the District of Alaska, First Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.–5-25-56

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

COUNSEL OF RECORD

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WENDELL KAY,
Box 1178,
Anchorage, Alaska.

In the District Court for the Territory of Alaska
First Judicial Division

No. 6725-A

HENRY RODEN,

Plaintiff,

vs.

EMPIRE PRINTING COMPANY, a Corporation,

Defendant.

AMENDED COMPLAINT

Comes Now the plaintiff and files this amended complaint herein, herein, and for a claim against the defendant, alleges:

1. That plaintiff has heretofore been, and is now a citizen of Juneau, Alaska, and the duly elected, qualified and acting Treasurer of the Territory of Alaska, and a person of good reputation among his neighbors and fellow citizens.

2. That under existing law the Treasurer of said Territory is ex officio a member of what is commonly known as the "Territorial Board of Road Commissioners" for said Territory, and said Board is composed of the Governor, the Highway Engineer and the Treasurer of said Territory; that Frank A. Metcalf is the duly elected, qualified and acting Highway Engineer of said Territory; that Ernest

Gruening is the duly appointed, qualified and acting Governor, and said two last named persons, together with this plaintiff, at all times herein mentioned, composed said Board of Road Commissioners and as such performed all duties assigned to it by the laws of said Territory.

3. That the defendant above named is a domestic corporation, engaged in the printing and publishing business and said corporation is the publisher and proprietor of that certain newspaper known as "The Daily Alaska Empire," printed and published at Juneau, Alaska, and of daily circulation in said town of Juneau and elsewhere in said Territory and other places.

4. That before the commission of the acts by defendant hereinafter complained of, the said Frank A. Metcalf, the said Ernest Gruening and this plaintiff, acting as the duly constituted Board of Territorial Road Commissioners, and pursuant to law, purchased and acquired for and on behalf of the Territory, the motor vessel "Chilkoot," and caused the same to be operated upon and in the waters of Southeastern Alaska for the transportation of passengers and the carrying of freight; that in order to operate said vessel as aforesaid it became and was necessary to employ seafaring men, purchase supplies and keep said vessel in seaworthy condition; that the cost and expenses thus incurred were paid, in part, by said Board out of revenues earned by said vessel.

5. That before the commission of the acts by defendant hereinafter complained of, one Oscar G. Olson had been the duly elected, qualified and acting Treasurer of the Territory of Alaska; that said Olson, upon indictment duly found by the Grand Jury for the Territory of Alaska, First Judicial Division, charging him, the said Olson with embezzlement of funds and money belonging to the Territory of Alaska, and coming into his possession as Treasurer of said Territory, entered his plea of guilty to such charges and upon such plea was duly sentenced by the United States District Court for the Territory of Alsaka, First Judicial Division, and to serve such sentence in the penitentiary on McNeil's Island, in the State of Washington, and said Olson, at all times herein mentioned was and now is confined in said penal institution.

6. That on the 25th day of September, 1952, the above named defendant, did then and there in the said newspaper called "The Daily Alaska Empire," publish, and caused to be published, certain false, scandalous, defamatory, and libelous headlines, articles and editorial: that a complete photostatic copy of the front page of "The Daily Alaska Empire" for September 25, 1952, is attached hereto marked Exhibit "A" and made a part hereof by reference the same as though copied herein verbatim; that of the material appearing on said front page, the following false, scandalous, defamatory, and libelous portions were published of and concerning this plaintiff:

Headline:

"Bare 'Special' Ferry Fund"

Sub-headline:

"Reeve Raps Graft, Corruption"

Sub-headline:

"Gruening, Metcalf, Roden, Divert 'Chilkoot' Cash to Private Bank Account"

News Article:

Entire article appearing two right hand columns, front page, including continuation right hand column, page two

Editorial:

Entire editorial entitled "Start Talking, Boys" center front page.

7. That said headlines, articles and editorial were maliciously published of and concerning plaintiff and were intended to and did expose plaintiff to the scorn, hatred and contempt of the general public and residents of Alaska and his friends and neighbors, and the same were intended to convey and did convey to the entire community and the general public the belief that plaintiff was dishonest and corrupt, and that he and his associates, Metcalf and Gruening, were guilty of the crime of embezzlement and of converting funds belonging to the Territory of Alaska to his and their own use, contrary to and in violation of law.

8. That the libel complained of herein was the culmination of a campaign of misrepresentation,

falsehood and calumny against the said Governor of Alaska, Ernest Gruening, intended to discredit and disgrace him and his associates in the administration of the affairs of the Territory of Alaska, including this plaintiff, and that the libel complained of herein and the campaign waged by the defendant for a long time prior thereto was wilful, wrongful and malicious and intended and designed to injure, disgrace and defame this plaintiff and to bring him into public disgrace and contempt.

That by reason of the false, malicious and defamatory publication aforesaid, plaintiff has been publicly disgraced and injured in his good name, to his damage in the sum of Fifty Thousand ($50,000) Dollars.

Wherefore, plaintiff prays judgment against the defendant in the sum of Fifty Thousand ($50,000) Dollars as compensatory or general damages and the sum of Fifty Thousand ($50,000) dollars as punitive or exemplary damages, and for costs and a reasonable attorneys' fee herein.

KAY, ROBISON AND MOODY,

/s/ HENRY RODEN,
Plaintiff.

Duly verified.

[Endorsed]: Filed April 16, 1953.

In the District Court for the Territory of Alaska
First Judicial Division

No. 6726-A

ERNEST GRUENING,

Plaintiff,

vs.

EMPIRE PRINTING COMPANY, a Corporation,

Defendant.

AMENDED COMPLAINT

Comes now the plaintiff and files this amended complaint herein, and for a claim against the defendant, alleges:

1. That plaintiff has heretofore been, and now is, a citizen of Juneau, Alaska, and the duly appointed, qualified and acting Governor of the Territory of Alaska, and a person of good reputation among his neighbors and fellow citizens.

2. That under existing law the Governor of said Territory is ex-officio a member of what is commonly known as the "Territorial Board of Road Commissioners" for said Territory, and said Board is composed of the Governor, the Highway Engineer and the Treasurer of said Territory; that Henry Roden is the duly elected, qualified and acting Treasurer of said Territory; that Frank A. Metcalf

is the duly elected, qualified and acting Highway Engineer, and said two last named persons, together with this plaintiff, at all times herein mentioned, composed said Board of Road Commissioners and as such performed all duties assigned to it by the laws of said Territory.

3. That the defendant above named is a domestic corporation, engaged in the printing and publishing business and said corporation is the publisher and proprietor of that certain newspaper known as "The Daily Alaska Empire," printed and published at Juneau, Alaska, and of daily circulation in said town of Juneau and elsewhere in said Territory and other places.

4. That before the commission of the acts by defendant hereinafter complained of, the said Henry Roden, the said Frank A. Metcalf and this plaintiff, acting as the duly constituted Board of Territorial Road Commissioners, and pursuant to law, purchased and acquired for and on behalf of the Territory, the motor vessel "Chilkoot," and caused the same to be operated upon and in the waters of Southeastern Alaska for the transportation of passengers and the carrying of freight; that in order to operate said vessel as aforesaid it became and was necessary to employ seafaring men, purchase supplies and keep said vessel in seaworthy condition; that the cost and expenses thus incurred were paid, in part, by said Board out of revenues earned by said vessel.

5. That before the commission of the acts by defendant hereinafter complained of, one Oscar G. Olson had been the duly elected, qualified and acting Treasurer of the Territory of Alaska; that said Olson, upon indictment duly found by the Grand Jury for the Territory of Alaska, First Judicial Division, charging him, the said Olson with embezzlement of funds and money belonging to the Territory of Alaska, and coming into his possession as Treasurer of said Territory, entered his plea of guilty to such charges and upon such plea was duly sentenced by the United States District Court for the Territory of Alaska, First Judicial Division, and to serve such sentence in the penitentiary on McNeil's Island, in the State of Washington, and said Olson, at all times herein mentioned was and now is confined in said penal institution.

6. That on the 25th day of September, 1952, the above-named defendant, did then and there in the said newspaper called "The Daily Alaska Empire," publish, and caused to be published, certain false, scandalous, defamatory, and libelous headlines, articles and editorial; that a complete photostatic copy of the front page of "The Daily Alaska Empire" for September 25, 1952, is attached hereto marked Exhibit "A" and made a part hereof by reference the same as though copied herein verbatim; that of the material appearing on said front page, the following false, scandalous, defamatory, and libelous portions were published of and concerning this plaintiff:

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Sub-headline:

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Sub-headline:

"Gruening, Metcalf, Roden, Divert 'Chilkoot' Cash to Private Bank Account"

News Article:

Entire article appearing two right hand columns, front page, including continuation right hand column, page two.

Editorial:

Entire editorial entitled "Start Talking, Boys" center front page.

7. That said headlines, articles and editorial were maliciously published of and concerning plaintiff and were intended to and did expose plaintiff to the scorn, hatred and contempt of the general public and residents of Alaska and his friends and neighbors, and the same were intended to convey and did convey to the entire community and the general public the belief that plaintiff was dishonest and corrupt, and that he and his associates, Roden and Metcalf, were guilty of the crime of embezzlement and of converting funds belonging to the Territory of Alaska to his and their own use, contrary to and in violation of law.

8. That the libel complained of herein was the culmination of a campaign of misrepresentation,

falsehood and calumny against the plaintiff intended to discredit and disgrace him and his administration of the affairs of the Territory of Alaska, and that the libel complained of herein and the campaign waged against the plaintiff by the defendant for a long time prior thereto was wilful, wrongful and malicious and intended and designed to injure, disgrace and defame this plaintiff and to bring him into public disgrace and contempt.

That by reason of the false, malicious and defamatory publication aforesaid, plaintiff has been publicly disgraced and injured in his good name, to his damage in the sum of One Hundred Thousand ($100,000) Dollars. That by reason of said false and malicious publication plaintiff demands exemplary and punitive damages against said defendant in the further sum of One Hundred Thousand ($100,000) Dollars.

Wherefore, plaintiff prays judgment against the defendant in the sum of Two Hundred Thousand ($200,000) Dollars and for costs and a reasonable attorneys' fee herein.

KAY, ROBISON AND MOODY,

/s/ ERNEST GRUENING,
Plaintiff.

Duly verified.

[Endorsed]: Filed April 16, 1953.

In the District Court for the Territory of Alaska,
First Judicial Division

No. 6727-A

FRANK A. METCALF,

Plaintiff,

vs.

EMPIRE PRINTING COMPANY, a Corporation,

Defendant.

AMENDED COMPLAINT

Comes Now the plaintiff and files this amended complaint herein, and for a claim against the defendant, alleges:

1. That plaintiff has heretofore been, and was at times mentioned herein, a citizen of Juneau, Alaska, and the duly elected, qualified and acting Highway Engineer of the Territory of Alaska, and a person of good reputation among his neighbors and fellow citizens.

2. That under existing law the Highway Engineer of said Territory is ex officio a member of what is commonly known as the "Territorial Board of Road Commissioners" for said Territory, and said Board is composed of the Governor, the Highway Engineer and the Treasurer of said Territory; that Henry Roden is the duly elected, qualified and

acting Treasurer of said Territory; that Ernest Gruening is the duly appointed, qualified and acting Governor, and said two last named persons, together with this plaintiff, at all times herein mentioned, composed said Board of Road Commissioners and as such performed all duties assigned to it by the laws of said Territory.

3. That the defendant above named is a domestic corporation, engaged in the printing and publishing business and said corporation is the publisher and proprietor of that certain newspaper known as "The Daily Alaska Empire," printed and published at Juneau, Alaska, and of daily circulation in said town of Juneau and elsewhere in said Territory and other places.

4. That before the commission of the acts by defendant hereinafter complained of, the said Henry Roden, the said Ernest Gruening and this plaintiff, acting as the duly constituted Board of Territorial Road Commissioners, and pursuant to law, purchased and acquired for and on behalf of the Territory, the motor vessel "Chilkoot," and cause the same to be operated upon and in the waters of Southeastern Alaska for the transportation of passengers and the carrying of freight; that in order to operate said vessel as aforesaid it became and was necessary to employ seafaring men, purchase supplies and keep said vessel in seaworthy condition; that the cost and expenses thus incurred were paid, in part, by said Board out of revenues earned by said vessel.

5. That before the commission of the acts by defendant hereinafter complained of, one Oscar G. Olson had been the duly elected, qualified and acting Treasurer of the Territory of Alaska; that said Olson, upon indictment duly found by the Grand Jury for the Territory of Alaska, First Judicial Division, charging him, the said Olson with embezzlement of funds and money belonging to the Territory of Alaska, and coming into his possession as Treasurer of said Territory, entered his plea of guilty to such charges and upon such plea was duly sentenced by the United States District Court for the Territory of Alaska, First Judicial Division, and to serve such sentence in the penitentiary on McNeil's Island, in the State of Washington, and said Olson, at all times herein mentioned was and now is confined in said penal institution.

6. That on the 25th day of September, 1952, the above-named defendant, did then and there in the said newspaper called "The Daily Alaska Empire," publish, and caused to be published, certain false, scandalous, defamatory, and libelous headlines, articles and editorial; that a complete photostatic copy of the front page of "The Daily Alaska Empire" for September 25, 1952, is attached hereto marked Exhibit "A" and made a part hereof by reference the same as though copied herein verbatim; that of the material appearing on said front page, the following false, scandalous, defamatory, and libelous portions were published of and concerning this plaintiff:

Headline:

"Bare 'Special' Ferry Fund"

Sub-headline:

"Reeve Raps Graft, Corruption"

Sub-headline:

"Gruening, Metcalf, Roden, Divert 'Chilkoot' Cash to Private Bank Account"

News Article:

Entire article appearing two right hand columns, front page, including continuation right hand column, page two.

Editorial:

Entire editorial entitled "Start Talking Boys" center front page.

7. That said headlines, articles and editorial were maliciously published of and concerning plaintiff and were intended to and did expose plaintiff to the scorn, hatred and contempt of the general public and residents of Alaska and his friends and neighbors, and the same were intended to convey and did convey to the entire community and the general public the belief that plaintiff was dishonest and corrupt, and that he and his associates, Roden and Gruening, were guilty of the crime of embezzlement and of converting funds belonging to the Territory of Alaska to his and their own use, contrary to and in violation of law.

8. That the libel complained of herein was the culmination of a campaign of misrepresentation,

falsehood and calumny against the said Governor of Alaska, Ernest Gruening, intended to discredit and disgrace him and his associates in the administration of the affairs of the Territory of Alaska, including this plaintiff, and that the libel complained of herein and the campaign waged by the defendant for a long time prior thereto was wilful, wrongful and malicious and intended and designed to injure, disgrace and defame this plaintiff and to bring him into public disgrace and contempt.

That by reason of the false, malicious and defamatory publication aforesaid, plaintiff has been publicly disgraced and injured in his good name, to his damage in the sum of One Hundred Thousand ($100,000.00) Dollars.

Wherefore, plaintiff prays judgment against the defendant in the sum of One Hundred Thousand ($100,000.00) Dollars and for costs and a reasonable attorneys' fee herein.

KAY, ROBISON AND MOODY,

/s/ FRANK A. METCALF,
Plaintiff.

Duly verified.

[Endorsed]: Filed April 16, 1953.

[Title of District Court and Cause.]

No. 6725-A

ANSWER OF DEFENDANT TO AMENDED COMPLAINT

Comes now the Empire Printing Company, a corporation, defendant above named, and in answer to the Complaint filed in the above-entitled case, admits, denies and alleges as follows:

I.

Defendant admits the allegations contained in Paragraph I.

II.

Defendant admits the allegations contained in Paragraph II.

III.

Defendant admits the allegations contained in Paragraph III.

IV.

Defendant admits the allegations contained in Paragraph IV.

V.

Defendant admits the allegations contained in Paragraph V.

VI.

Referring to the allegations contained in Paragraph VI, the defendant admits that it published in The Daily Alaska Empire the articles and editorial set forth in Exhibit "A" to plaintiff's Amended Complaint, and defendant denies that any portions

of the articles or editorial were false, scandalous, defamatory or libelous.

VII.

Defendant denies the allegations contained in Paragraph VII of plaintiff's Amended Complaint.

VIII.

Defendant denies each and every allegation contained in Paragraph VIII of the Amended Complaint, and in this connection alleges that plaintiff's reputation and name have remained the same since the publication of the articles complained of in Paragraph VI of the Amended Complaint, as they were before the publication of those articles.

For a further, separate and affirmative defense to plaintiff's Complaint, the defendant alleges as follows:

First Affirmative Defense

I.

Defendant realleges all the allegations and repeats the admissions and denials contained in Paragraphs I to VIII, inclusive, of its answer to the Amended Complaint as hereinabove set forth.

II.

That the articles complained of and referred to in plaintiff's Amended Complaint are set forth in full in Exhibit "A," "B" and "C" hereto attached and made a part of this Answer, and prayed to be read in connection herewith as fully as though set forth

in each and every paragraph to which reference is made thereto.

III.

That all the facts stated in the articles complained of are true and correct, and as therein stated, and these facts are of record in the office of the Auditor of the Territory of Alaska and all opinions expressed in setting forth the facts are a fair comment thereon and privileged, as more fully set forth and claimed hereinafter.

IV.

That all the facts set forth in the editorial contained on page one of the issue of the Empire of September 25, 1952, and contained in Exhibit "A" attached to plaintiff's Amended Complaint are true and correct and all comment made upon the facts set forth in the editorial are fair comment and privileged criticism, as more fully set forth hereinafter.

Second Affirmative Defense

I.

Defendant realleges all the allegations set forth in Paragraphs I to VI, inclusive, of its Answer to plaintiff's Complaint, and in Paragraphs I to IV, inclusive, of the First Affirmative Defense.

II.

That the Daily Alaska Empire is a newspaper of general circulation published in Juneau, Alaska, and circulated and read throughout the Territory and

elsewhere, and one of its functions is to keep the people, the taxpayers and voters and all the inhabitants of the Territory, fully informed of the official acts of its Territorial and Federal officials, and especially to inform the taxpayers and inhabitants of the Territory of the disposition of public funds and all methods employed in the disbursement thereof, and to call attention of the public to all irregularities in the receipt, disbursement and handling of public funds, and the articles complained of by the plaintiff and which are set forth in Exhibits "A" and "B" to this answer were written for that purpose and on information furnished the defendant from public records and based upon information furnished by public officials, and that information is true, and one of the duties of the defendant in the publication of facts pertaining to the official acts of its officials and of the Federal officials dealing with Territorial affairs is to comment upon such facts, express opinions and draw conclusions for the benefit of the taxpayers, voters and inhabitants of the Territory of Alaska, and the defendant is privileged and it is its duty to make such comment.

III.

That in the venture of the Territory into the transportation business as set forth in plaintiff's Complaint, there has been a very substantial loss of public funds, not only in the purchase and repair of the vessel "Chilkoot," but in its operation, and one of the duties of the defendant is to inform the public of the facts and of all irregularities in the han-

dling of funds, whether these irregularities were in good faith or otherwise, and it was especially the duty of the defendant to publish such facts during an election campaign. That Territorial Highway Engineer Frank A. Metcalf was a candidate for reelection to his office at the time the publication was made, and plaintiff is another elective official of the Territory, and the Governor is an appointed official appointed by the President of the United States, and at the time of the publication of the articles complained of there was an election pending for President of the United States and for members of Congress. That the Territorial election had been set by law for October 14, 1952, and the Presidential election for November 4, 1952.

IV.

That the publication complained of and which was based upon facts furnished the defendant and which the defendant firmly believed to be true, contained comments and opinions of the defendant which were based upon the belief of the officers of defendant that the facts were true, and that the comments and opinions expressed were justified, and these comments and opinions were not published for the purpose of injuring the plaintiff or anyone else, and they contained no statement or implication that the plaintiff had embezzled, stolen or converted to his own use any monies whatsoever, but the intention of the articles as a whole was to inform the general public, the taxpayers, inhabitants of the Territory and the candidates for public offices, including can-

didates for the Territorial legislature, that there were irregularities and illegal and unauthorized acts committed by the plaintiff, Gruening and Metcalf, in the receipt, handling and disbursement of public funds.

V.

That the matters covered by the publication aforesaid were matters of public concern in which the public of the Territory of Alaska was vitally interested, and the criticism of the acts of plaintiff, Gruening and Metcalf, was justified and based upon true and privileged statements of fact which were known and available to all members of the public, including the plaintiff; the opinions were the actual opinions of defendant and its officers, employees and writers, and they were not expressed for the purpose of causing harm to anyone, and they dealt only with the public conduct of public officials.

Third Affirmative Defense

I.

As a third and separate Affirmative Defense, defendant realleges all the allegations, admissions and denials contained in the Answer to plaintiff's Complaint, and in the First and Second Affirmative Defenses.

II.

That on September 25, 1952, in the issue of the Daily Alaska Empire and on page one of the Empire and immediately adjoining the article complained of, the defendant published the explana-

tion of plaintiff and Frank A. Metcalf, Territorial Highway Engineer, who were the two members of the Territorial Board of Road Commissioners serving with the Governor, Ernest Gruening, and their opinion and explanation was published in detail and it was published for the purpose of giving to the public such explanation as the members of the Territorial Board of Road Commissioners, including this plaintiff, desired to give regarding the handling of the funds referred to. A full, true and correct copy of the statement of plaintiff and Metcalf is hereto attached and marked Exhibit "C," and prayed to be read as a part of this answer, and reference is made thereto as though fully set forth herein.

III.

That at the time of the publication the Governor was not available for comment, but the Territorial Highway Engineer and the plaintiff constituted a majority of the membership of the Board, and their explanation and their statement has not at any time been denied in whole or in part by the Governor, and although the columns of the Daily Alaska Empire have been open to him at all times and all statements given by him to the defendant have been published in full.

IV.

That there was no malice in the publications of September 25, 1952, which are complained of, and the publication was made solely in the public interest and for the purpose of giving information to

the public, as hereinabove alleged; and it was privileged criticism.

V.

That in order to emphasize the fact that there was no malice intended in the publication of articles complained of in plaintiff's Complaint and no intent to injure the plaintiff or to charge him with the commission of any crime, the defendant, on September 26, 1952, published in a prominent place on the front page of its issue of the Daily Alaska Empire of that date, in large type, a statement, a full, true and correct copy of which is hereto attached and marked Exhibit "D," and prayed to be read as a part of this Answer as though fully set forth in this paragraph, and to which reference is hereby made.

Wherefore defendant prays that plaintiff's Amended Complaint be dismissed, and that it have and recover from the plaintiff its costs and disbursements herein.

A jury is requested for the trial of the above-entitled cause.

Dated at Juneau, Alaska, this 11th day of August, 1953.

/s/ H. L. FAULKNER,

/s/ R. E. ROBERTSON,

Attorneys for Defendant.

Duly Verified.

EXHIBIT "A"

Bare "Special" Ferry Fund

Gruening, Metcalf, Roden
Divert "Chilkoot" Cash to
Private Bank Account

Auditor Neil Moore and Assistant
Attorney General John Dimond
Halt Payments From Fund

By Jack D. Daum

To avoid paying territorial money into the general fund as provided by law, Governor Gruening, Treasurer Roden and Highway Engineer Frank Metcalf have set up a "special fund" at a Juneau bank, territorial auditor Neil Moore disclosed today.

Illegal Payments

The "special fund," which dated back to early last year, is in the B. M. Behrends bank under the name "Chilkoot Ferry—by Robert E. Coughlin." Into it have gone the receipts from the operation of the ferry which was purchased by the Territory in May, 1951, and there have been thousands of dollars of illegal receipts and disbursements recorded in the fund to date, Moore charged.

After learning of the unauthorized account late last month, Auditor Moore and assistant attorney general John Dimond ordered the bank to stop payment on all checks drawn against the account.

The case closely parallels that of Oscar Olson, former territorial treasurer who is now serving a prison term at McNeil's Island penitentiary for violating the law in the receipt and disbursement of public funds.

Bookkeeping Trick

The special account, established and maintained without knowledge of the territorial auditor, was set up to enable the highway engineer, Frank Metcalf, to keep the ferry receipts out of the normal channels of territorial finances, Moore declared. Metcalf labeled the move a "trick of bookkeeping" which permits him to operate the ferry without depleting the funds given him by the legislature to run his department.

Both Metcalf and Henry Roden, territorial treasurer, admitted the existence of the fund and did not deny that payments have been made from it.

They declared there was no provision in law under which the money could be kept in the highway engineer's department, and admitted they acted as members of the Territorial Board of road commissioners in side-tracking the money into a private bank instead of into the territorial treasury.

Governor Absent

The third member of the board, Ernest Gruening, has not returned from his pre-election "road inspection" tour and was not available for comment today. He is expected to return to Juneau,

however, in time to attend a Democratic rally Saturday night.

When questioned by an Empire reporter, Metcalf produced a record of the June 6, 1951, meeting of the board of road commissioners, attended by himself, Roden, Gruening and J. Gerald Williams, territorial attorney general.

The minutes disclose discussion by the board as to the possibility of depositing ferry receipts in the motor fuel tax fund for use by the highway engineer instead of placing them into the general fund as required by law, where the money would be used for schools, hospitals and other trritorial-wide benefits.

Abandon Scheme

This idea was abandoned, the minutes show, on the advice of Williams, who told the board such a transaction would be illegal.

Then, the minutes disclose, on a motion by Roden, the board decided to set up the "special account" in a private bank. There the money could be deposited and spent without the knowledge or approval of the auditor. Such an account was opened at Behrends bank, under the name "Robert E. Coughlin" instead of in the name of the board or of the highway engineer.

Opinion

On June 19, less than two weeks after the board meeting, Auditor Moore asked Attorney General Williams for an opinion as to where the receipts of

the ferry should be deposited. Williams replied on June 21 with the written opinion that, under Section 12-2-1, ACLA 1949, it is mandatory that the money be placed in the general fund.

Williams added, however, that a new act the 1951 Reorganization Act which Williams later declared invalid—the money could be deposited in the motor fuel fund. His letter to Moore did not mention the legality of the outside "special fund."

News to Moore

Auditor Moore learned of the existence of the unauthorized account late last month, when the ferryboat captain, Steve Larsson Homer, who resigned the position brought him the check Homer had received in payment for overtime.

Moore noted that the check was drawn on the "Chilkoot Ferry" account and was signed by Robert E. Coughlin. Homer, as a territorial employee, should have been paid by territorial warrant, Moore said. Homer then disclosed that some of the operating expenses of the ferry were being paid from the "special account."

Letter

The auditor then wrote the following letter, dated August 25, 1952, to Attorney General Williams:

"Mr. J. Gerald Williams,
"Attorney General of Alaska,
"Juneau, Alaska.

"Dear Mr. Williams:

"This office has irrefutable evidence that the Territorial Board of Road Commissioners, consisting of the Governor of Alaska, the Treasurer of Alaska, and the Highway Engineer, have violated the laws of the Territory and repeated opinions of your office relative to the handling of funds collected from shippers and travelers using the Territorial-owned 'Chilkoot ferry.'

"For your information, the Board of Road Commissioners is paying claims against the Territory out of a special account which they have set up at B. M. Behrends Bank, of Juneau. This special account is made up from the receipts earned by the ferry, which receipts, according to your opinion, must be deposited in the General Fund by the Treasurer.

"The procedure followed by the said Board is the same as that followed by the former Treasurer of Alaska, i. e., unauthorized payments.

"Therefore, in view of your several opinions and the various Territorial laws, namely:

"Section 11-3-8, ACLA, 1949, 'Salaries and expenses to be paid from appropriations';

"Section 12-2-1, ACLA, 1949, 'Territorial Moneys; Accounting and payment to Territorial Treasurer; covering into General Fund'; and

"Section 12-3-1, ACLA, 1949, 'Disbursements: To be made on vouchers: Accountability of disbursing officers,' which have all been ignored, the matter, because of its extreme seriousness, is being turned over to you to recover the money and to immediately stop all illegal payments of Territorial funds.

"Respectfully yours,

"NEIL F. MOORE,
"Auditor of Alaska."

Stop Order

Williams was out of town and did not receive this letter, but his assistant, John Dimond, read it and went immediately to Moore and to the bank to verify the charges. After learning such an account existed, Dimond and Moore ordered the bank to stop payment on all checks against the ferry fund. This order was verified by a letter from Moore the following day.

Since then there has been no further action in the case. Any investigation to determine the extent to which the law has been broken now rests presumably with the U. S. district attorney, P. J. Gilmore, Jr., who said last night he is the sole prosecuting officer in this division for territorial and federal criminal cases.

The Empire learned of the unprecedented transaction when Homer told the story to a reporter.

EXHIBIT "B"

Start Talking, Boys
(An Editorial)

Disclosed in today's Empire is a story almost too fantastic for belief, but the facts have been personally verified by both the territorial auditor and assistant attorney general.

By agreement between the governor, the treasurer and the highway engineer, territorial money has been diverted from the channels prescribed by law and placed in a "special account" to be disbursed without the approval or knowledge of the auditor, without territorial warrant, and by a man who is not a territorial officer.

The laws of Alaska, well known to Gruening, Roden and Metcalf, carefully spell out the method by which public money may be spent. The law stipulates that every expenditure by the department heads will be made by warrant and approved by the auditor.

This is no vague technicality hidden away in small print. It is a matter of law known and understood by every territorial employee who handles public money.

The law was designed to protect the taxpayers' interest. When money is received by the Territory it is placed in the general fund unless specifically earmarked by the legislature for other purposes. The

treasurer is the custodian of that money, and the auditor is the watchdog whose duty is to make certain it is legally spent.

Here we have three of Alaska's highest officials—two of them elected and the other a presidential appointee—setting up an outside bank account with the money which should have gone to the general fund. The minutes of the June 6, 1951, meeting of the board of road commissioners disclose that the decision to establish the fund was agreed upon by unanimous consent.

Disbursements from this fund were neither referred to nor approved by the auditor. The only name on the checks was that of Robert E. Coughlin.

Roden and Metcalf offer the explanation that the special treatment of this money was made necessary by an "emergency." They said the board had to act quickly in buying the ferry to keep it from going out of business, and that the receipts from the ferry operation had to be diverteed so they could be used directly to pay operating costs.

If this method of by-passing the law is acceptable to the attorney general and the U. S. District Attorney, why is it not possible for every department head who finds himself running over his appropriation to set up "special funds" from the money his office takes in?

If disbursements by the highway engineer's department need not be approved by the auditor, why

should any other department take the trouble to obtain such an approval.

And if the law can be by-passed and disregarded in this case, why must anyone obey the law?

This is, of course, merely the latest in the many "deals" with which Gruening has closely aligned himself. His personal defense of the Palmer Airport Deal as a "highly intelligent transaction" still rings stridently in the ears of all honest Alaskans.

Yet the "highly honorable" Palmer Deal was denounced by a bi-partisan committee of United States senators as an underhanded attempt to cheat the federal government out of thousands of dollars of taxpayers' money.

We can rest assured that when the governor returns from his pre-election "road inspection" tour he will be the first to scream "politics" at Neil Moore's disclosure of this latest "deal."

But this is a case where Gruening, Roden and Metcalf will have to stand on their own feet and explain to Alaskans whether the territorial law is applicable to some and not to others or whether they acted in complete defiance to the law in the belief they would not be caught.

Oscar Olson sits today in his prison cell, dreaming of the days when he thought territorial laws were only for the underlings.

EXHIBIT "C"

Roden, Metcalf Say "Nothing Crooked" Here

Territorial treasurer Henry Roden and highway engineer, Frank Metcalf admitted this week that the board of road commissioners set up a "special fund" at the B. M. Behrends bank, and offered the following explanation of how it was done:

In the spring of 1951, when the owners of the M. V. Chilkoot decided to sell the ferry, there were no buyers available. There was a danger of the ferry, which connects Haines with Juneau, going out of business.

The board did not want to see the ferry go out of business because it had been advertised widely in the States that tourists could drive their cars to Haines, Juneau and Skagway. The board considered the ferry an integral part of the road system.

Buy Ferry

In May, the board decided to buy the ferry, which it did, paying some $30,000 for the boat and business.

The ferry's operation was placed under the control of Metcalf, who supervised the needed repairs, amounting to about $29,000, and hired the necessary personnel.

To operate his department, Metcalf is allowed to spend only the money appropriated for it by the legislature. The ferry operation placed a strain on this money, threatening to deplete it.

Receipts from the ferry's operation would have bolstered the department's funds, but the attorney general advised that the law requires all monies paid the territory to go into the general fund. The receipts, therefore, could not legally be used to pay ferry operating expenses.

If the law were disregarded and the receipts poured back into the ferry, the act would come to the attention of the Auditor of Alaska, who is the territory's watchdog on money matters.

Bypass Auditor

Thus, the only method by which the money could be used without detection, to operate the ferry, was to keep the money separate from the normal financial channels of the Territory. To this end the board agreed, on June 6, 1951, to set up the "special account" in the bank and to deposit all receipts in this account instead of into the general fund.

The board further agreed to pay all operating expenses of the ferry out of this "special account." None of the vouchers for receipt of payment of this money was to go through the auditor's office.

Roden and Metcalf each insisted that there "is nothing crooked about this. The books are open for auditing any time." Metcalf termed the deal "just a trick of bookkeeping."

Governor Gruening, the third member of the board was not in town for comment.

EXHIBIT "D"

Attention

Our attention has been called to a paragraph in yesterday's lead story about the Chilkoot Ferry bank account. A parallel was drawn between this case and that of a former Territorial official now confined to a federal prison.

It was not our intention to infer that there has been any misappropriation or theft of these funds, but merely that in both cases, checks were drawn against territorial funds in bank accounts without being offered for the scrutiny of the Office of the Auditor as provided for by the law.

The Empire regrets any misunderstanding that may have arisen from this paragraph and hastens to repeat that there has been no evidence of any fraudulent or personal use of any of the funds in the special account.

[Endorsed]: Filed August 14th, 1953.

[Title of District Court and Cause.]

No. 6726-A

ANSWER OF DEFENDANT TO AMENDED COMPLAINT

Comes now the Empire Printing Company, a corporation, defendant above named, and in answer

to the Complaint filed in the above-entitled case, admits, denies and alleges as follows:

I.

Referring to the allegations contained in Paragraph I, the defendant admits that the plaintiff has heretofore been a resident of Juneau, Alaska, and that he was for twelve years and until April 10, 1953, the duly-appointed and acting Governor of the Territory of Alaska, and with reference to the allegation regarding plaintiff's reputation, the defendant alleges that he has been for twelve years a controversial figure in Alaskan politics and that his reputation among a certain class who have been allied with him in politics has apparently been good, but it has been otherwise with more than an equal number of plaintiff's neighbors and fellow citizens and residents of the Territory.

II.

Defendant admits the allegations contained in Paragraph II.

III.

Defendant admits the allegations contained in Paragraph III.

IV.

Defendant admits the allegations contained in Paragraph IV.

V.

Defendant admits the allegations contained in Paragraph V.

VI.

Referring to the allegations contained in Paragraph VI, the defendant admits that it published in The Daily Alaska Empire the articles and editorial set forth in Exhibit "A" to plaintiff's Amended Complaint, and defendant denies that any portions of the articles or editorial were false, scandalous, defamatory or libelous.

VII.

Defendant denies the allegations contained in Paragraph VII of plaintiff's Amended Complaint.

VIII.

Defendant denies each and every allegation contained in Paragraph VIII of the Amended Complaint, and in this connection alleges that plaintiff's reputation and name have remained the same since the publication of the articles complained of in Paragraph VI of the Amended Complaint, as they were before the publication of those articles.

For a further, separate and affirmative defense to plaintiff's Complaint, the defendant alleges as follows:

First Affirmative Defense

I.

Defendant realleges all the allegations and repeats the admissions and denials contained in Paragraphs I to VIII, inclusive, of its answer to the Amended Complaint as hereinabove set forth.

II.

That the articles complained of and referred to in Plaintiff's Amended Complaint are set forth in full in Exhibits "A," "B" and "C" hereto attached and made a part of this Answer, and prayed to be read in connection herewith as fully as though set forth in each and every paragraph to which reference is made thereto.

III.

That all the facts stated in the articles complained of are true and correct, and as therein stated, and these facts are of record in the office of the Auditor of the Territory of Alaska and all opinions expressed in setting forth the facts are a fair comment thereon and privileged, as more fully set forth and claimed hereinafter.

IV.

That all the facts set forth in the editorial contained on page 1 of the issue of the Empire of September 25, 1952, and contained in Exhibit "A" attached to plaintiff's Amended Complaint are true and correct and all comment made upon the facts set forth in the editorial are fair comment and privileged criticism, as more fully set forth hereinafter.

Second Affirmative Defense

I.

Defendant realleges all the allegations set forth in Paragraphs I to VI, inclusive, of its Answer to plaintiff's Complaint, and in Paragraphs I to IV inclusive of the First Affirmative Defense.

II.

That the Daily Alaska Empire is a newspaper of general circulation published in Juneau, Alaska, and circulated and read throughout the Territory and elsewhere, and one of its functions is to keep the people, the taxpayers and voters and all the inhabitants of the Territory, fully informed of the official acts of its Territorial and Federal officials, and especially to inform the taxpayers and inhabitants of the Territory of the disposition of public funds and all methods employed in the disbursement thereof, and to call attention of the public to all irregularities in the receipt, disbursement and handling of public funds, and the articles complained of by the plaintiff and which are set forth in Exhibits "A" and "B" to this answer were written for that purpose and on information furnished the defendant from public records and based upon information furnished by public officials, and that information is true, and one of the duties of the defendant in the publication of facts pertaining to the official acts of its officials and of the Federal officials dealing with Territorial affairs is to comment upon such facts, express opinions and draw conclusions for the benefit of the taxpayers, voters and inhabitants of the Territory of Alaska, and the defendant is privileged and it is its duty to make such comment.

III.

That in the venture of the Territory into the transportation business as set forth in plaintiff's Complaint, there has been a very substantial loss of public funds, not only in the purchase and repair of

the vessel "Chilkoot," but in its operation, and one of the duties of the defendant is to inform the public of the facts and of all irregularities in the handling of funds, whether these irregularities were in good faith or otherwise, and it was especially the duty of the defendant to publish such facts during an election campaign. That Territorial Highway Engineer Frank A. Metcalf was a candidate for re-election to his office at the time the publication was made, and the Treasurer Henry Roden is another elective official of the Territory, and the plaintiff is an appointed official, appointed by the President of the United States, and at the time of the publication of the articles complained of there was an election pending for President of the United States and for members of Congress. That the Territorial election had been set by law for October 14, 1952, and the Presidential election for November 4, 1952.

IV.

That the publication complained of and which was based upon facts furnished the defendant and which the defendant firmly believed to be true, contained comments and opinions of the defendant which were based upon the belief of the officers of defendant that the facts were true, and that the comments and opinions expressed were justified, and these comments and opinions were not published for the purpose of injuring the plaintiff or anyone else, and they contained no statement or implication that the plaintiff had embezzled, stolen or converted to his own use any monies whatsoever, but the intention

of the articles as a whole was to inform the general public, the taxpayers, inhabitants of the Territory and the candidates for public offices, including candidates for the Territorial legislature, that there were irregularities and illegal and unauthorized acts committed by the plaintiff, Roden and Metcalf, in the receipt, handling and disbursement of public funds.

V.

That the matters covered by the publication aforesaid were matters of public concern in which the public of the Territory of Alaska was vitally interested, and the criticism of the acts of plaintiff, Roden and Metcalf, was justified and based upon true and privileged statements of fact which were known and available to all members of the public, including the plaintiff; the opinions were the actual opinions of defendant and its officers, employees and writers, and they were not expressed for the purpose of causing harm to anyone, and they dealt only with the public conduct of public officials.

Third Affirmative Defense

I.

As a third and separate Affirmative Defense, defendant realleges all the allegations, admissions and denials contained in the Answer to plaintiff's Complaint, and in the First and Second Affirmative Defenses.

II.

That on September 25, 1952, in the issue of the Daily Alaska Empire and on page one of the

Empire and immediately adjoining the article complained of, the defendant published the explanation of Henry Roden, Territorial Treasurer, and Frank A. Metcalf, Territorial Highway Engineer, who were the two members of the Territorial Board of Road Commisioners serving with the plaintiff, and their opinion and explanation was published in detail and it was published for the purpose of giving to the public such explanation as the members of the Territorial Board of Road Commissioners, including this plaintiff, desired to give regarding the handling of the funds referred to. A full, true and correct copy of the statement of Roden and Metcalf is hereto attached and marked Exhibit "C," and prayed to be read as a part of this answer, and reference is made thereto as though fully set forth herein.

III.

That at the time of the publication the plaintiff was not available for comment, but the Territorial Highway Engineer and the Territorial Treasurer constituted a majority of the membership of the Board, and their explanation and their statement has not at any time been denied in whole or in part by the plaintiff, and although the columns of the Daily Alaska Empire have been open to him at all times and all statements given by him to the defendant have been published in full.

IV.

That there was no malice in the publications of September 25, 1952, which are complained of, and

the publication was made solely in the public interest and for the purpose of giving information to the public, as hereinabove alleged; and it was privileged criticism.

V.

That in order to emphasize the fact that there was no malice intended in the publication of articles complained of in plaintiff's Complaint and no intent to injure the plaintiff or to charge him with the commission of any crime, the defendant, on September 26, 1952, published in a prominent place on the front page of its issue of the Daily Alaska Empire of that date, in large type, a statement, a full, true and correct copy of which is hereto attached and marked Exhibit "D," and prayed to be read as a part of this Answer as though fully set forth in this paragraph, and to which reference is hereby made.

Wherefore, defendant prays that plaintiff's Amended Complaint be dismissed, and that it have and recover from the plaintiff its costs and disbursements herein.

A jury is requested for the trial of the above-entitled cause.

Dated at Juneau, Alaska, this 11th day of August, 1953.

/s/ H. L. FAULKNER,

/s/ R. E. ROBERTSON,

Attorneys for Defendant.

Duly Verified.

[Exhibit A, B, C and D attached to the foregoing are identical to Exhibits A, B, C and D attached to the Answer, Cause No. 6725-A, set out in full, pages 26 to 37 of this printed record.]

[Endorsed]: Filed August 14th, 1953.

[Title of District Court and Cause.]

No. 6727-A

ANSWER OF DEFENDANT TO AMENDED COMPLAINT

Comes now the Empire Printing Company, a corporation, defendant above named, and in answer to the Complaint filed in the above-entitled case, admits, denies and alleges as follows:

I.

Defendant admits the allegations contained in Paragraph I.

II.

Defendant admits the allegations contained in Paragraph II.

III.

Defendant admits the allegations contained in Paragraph III.

IV.

Defendant admits the allegations contained in Paragraph IV.

V.

Defendant admits the allegations contained in Paragraph V.

VI.

Referring to the allegations contained in Paragraph VI, the defendant admits that it published in the Daily Alaska Empire the articles and editorial set forth in Exhibit "A" to plaintiff's Amended Complaint, and defendant denies that any portions of the articles or editorial were false, scandalous, defamatory or libelous.

VII.

Defendant denies the allegations contained in Paragraph VII of plaintiff's Amended Complaint.

VIII.

Defendant denies each and every allegation contained in Paragraph VIII of the Amended Complaint, and in this connection alleges that plaintiff's reputation and name have remained the same since the publication of the articles complained of in Paragraph VI of the Amended Complaint, as they were before the publication of those articles.

For a further, separate and affirmatives defense to plaintiff's Complaint, the defendant alleges as follows:

First Affirmative Defense

I.

Defendant realleges all the allegations and repeats the admissions and denials contained in Paragraphs I to VIII, inclusive, of its answer to the Amended Complaint as hereinabove set forth.

II.

That the articles complained of and referred to in

plaintiff's Amended Complaint are set forth in full in Exhibits "A," "B" and "C" hereto attached and made a part of this Answer, and prayed to be read in connection herewith as fully as though set forth in each and every paragraph to which reference is made thereto.

III.

That all the facts stated in the articles complained of are true and correct, and as therein stated, and these facts are of record in the office of the Auditor of the Territory of Alaska and all opinions expressed in setting forth the facts are a fair comment thereon and privileged, as more fully set forth and claimed hereinafter.

IV.

That all the facts set forth in the editorial contained on page one of the issue of the Empire of September 25, 1952, and contained in Exhibit "A" attached to plaintiff's Amended Complaint are true and correct and all comment made upon the facts set forth in the editorial are fair comment and privileged criticism, as more fully set forth hereinafter.

Second Affirmative Defense

I.

Defendant realleges all the allegations set forth in Paragraphs I to VI, inclusive, of its Answer to plaintiff's Complaint, and in Paragraphs I to IV, inclusive, of the First Affirmative Defense.

II.

That the Daily Alaska Empire is a newspaper of general circulation published in Juneau, Alaska,

and circulated and read throughout the Territory and elsewhere, and one of its functions is to keep the people, the taxpayers and voters and all the inhabitants of the Territory, fully informed of the official acts of its Territorial and Federal officials, and especially to inform the taxpayers and inhabitants of the Territory of the disposition of public funds and all methods employed in the disbursement thereof, and to call attention of the public to all irregularities in the receipt, disbursement and handling of public funds, and the articles complained of by the plaintiff and which are set forth in Exhibits "A" and "B" to this answer were written for that purpose and on information furnished the defendant from public records and based upon information furnished by public officials, and that information is true, and one of the duties of the defendant in the publication of facts pertaining to the official acts of its officials and of the Federal officials dealing with Territorial affairs is to comment upon such facts, express opinions and draw conclusions for the benefit of the taxpayers, voters and inhabitants of the Territory of Alaska, and the defendant is privileged and it is its duty to make such comment.

III.

That in the venture of the Territory into the transportation business as set forth in plaintiff's Complaint, there has been a very substantial loss of public funds, not only in the purchase and repair of the vessel "Chilkoot," but in its operation, and one of the duties of the defendant is to inform the

public of the facts and of all irregularities in the handling of funds, whether these irregularities were in good faith or otherwise, and it was especially the duty of the defendant to publish such facts during an election campaign. That plaintiff was a candidate for re-election to his office at the time the publication was made, and the Treasurer Henry Roden is another elective official of the Territory, and the Governor is an appointed official appointed by the President of the United States, and at the time of the publication of the articles complained of there was an election pending for President of the United States and for members of Congress. That the Territorial election had been set by law for October 14, 1952, and the Presidential election for November 4, 1952.

IV.

That the publication complained of and which was based upon facts furnished the defendant and which the defendant firmly believed to be true, contained comments and opinions of the defendant which were based upon the belief of the officers of defendant that the facts were true, and that the comments and opinions expressed were justified, and these comments and opinions were not published for the purpose of injuring the plaintiff or anyone else, and they contained no statement or implication that the plaintiff had embezzled, stolen or converted to his own use any monies whatsoever, but the intention of the articles as a whole was to inform the general public, the taxpayers, inhabitants of the Territory and the candidates for public offices, including can-

didates for the Territorial Legislature, that there were irregularities and illegal and unauthorized acts committed by the plaintiff, Gruening and Roden, in the receipt, handling and disbursement of public funds.

V.

That the matters covered by the publication aforesaid were matters of public concern in which the public of the Territory of Alaska was vitally interested, and the criticism of the acts of plaintiff, Gruening and Roden, was justified and based upon true and privileged statements of fact which were known and available to all members of the public, including the plaintiff; the opinions were the actual opinions of defendant and its officers, employees and writers, and they were not expressed for the purpose of causing harm to anyone, and they dealt only with the public conduct of public officials.

Third Affirmative Defense

I.

As a third and separate Affirmative Defense, defendant realleges all the allegations, admissions and denials contained in the Answer to plaintiff's Complaint, and in the First and Second Affirmative Defenses.

II.

That on September 25, 1952, in the issue of the Daily Alaska Empire and on page one of the Empire and immediately adjoining the article complained of, the defendant published the explanation

of plaintiff and Henry Roden, Territorial Treasurer, who were the two members of the Territorial Board of Road Commissioners serving with the Governor, Ernest Gruening, and their opinion and explanation was published in detail and it was published for the purpose of giving to the public such explanation as the members of the Territorial Board of Road Commissioners, including this plaintiff, desired to give regarding the handling of the funds referred to. A full, true and correct copy of the statement of plaintiff and Roden is hereto attached and marked Exhibit "C," and prayed to be read as a part of this answer, and reference is made thereto as though fully set forth herein.

III.

That at the time of the publication the Governor was not available for comment, but the Territorial Treasurer and the plaintiff constituted a majority of the membership of the Board, and their explanation and their statement has not at any time been denied in whole or in part by the Governor, and although the columns of the Daily Alaska Empire have been open to him at all times and all statements given by him to the defendant have been published in full.

IV.

That there was no malice in the publications of September 25, 1952, which are complained of, and the publication was made solely in the public interest and for the purpose of giving information to the public, as hereinabove alleged; and it was privileged criticism.

V.

That in order to emphasize the fact that there was no malice intended in the publication of articles complained of in plaintiff's Complaint and no intent to injure the plaintiff or to charge him with the commission of any crime, the defendant, on September 26, 1952, published in a prominent place on the front page of its issue of the Daily Alaska Empire of that date, in large type, a statement, a full, true and correct copy of which is hereto attached and marked Exhibit "D," and prayed to be read as a part of this Answer as though fully set forth in this paragraph, and to which reference is hereby made.

Wherefore, defendant prays that plaintiff's Amended Complaint be dismissed, and that it have and recover from the plaintiff its costs and disbursements herein.

A jury is requested for the trial of the above-entitled cause.

Dated at Juneau, Alaska, this 11th day of August, 1953.

/s/ H. L. FAULKNER,

/s/ R. E. ROBERTSON,

Attorneys for Defendant.

Duly Verified.

[Exhibits A, B, C and D attached to the foregoing are identical to Exhibits A, B, C and D attached to the Answer, Cause No 6725-A, set out in full, pages 26 to 37 of this printed record.]

[Endorsed]: Filed August 14th, 1953.

In the United States District Court for the District of Alaska Division Number One, at Juneau

No. 6725-A

HENRY RODEN,

Plaintiff,

vs.

EMPIRE PRINTING COMPANY, a Corporation,

Defendant.

No. 6726-A

ERNEST GRUENING,

Plaintiff,

vs.

EMPIRE PRINTING COMPANY, a Corporation,

Defendant.

No. 6727-A

FRANK A. METCALF,

Plaintiff,

vs.

EMPIRE PRINTING COMPANY, a Corporation,

Defendant.

ORDER FOR CONSOLIDATION

The court having examined the pleadings in the above-captioned cases, which are all libel suits against the defendant, and it appearing that the issues of fact and of law are common to all cases,

and that it would be an unnecessary expense to all parties and to the government if separate trials were had of the issues involved in the cases,

Now, Therefore, under the provisions of Rule 42(a) of the Federal Rules of Civil Procedure, it is hereby

Ordered, that the above-entitled cases be consolidated and tried jointly.

Dated at Juneau, Alaska, this 24th day of September, 1954.

/s/ GEORGE W. FOLTA,
Judge.

[Endorsed]: Filed September 28th, 1954.

[Title of District Court and Cause.]

Nos. 6725-A, 6726-A and 6727-A

MOTION OF DEFENDANT FOR DIRECTED VERDICT

Defendant now moves the court to direct the jury to find verdicts for defendant in the three consolidated cases. This motion is based on grounds as follows:

First:

The article published by defendant on September 25, 1952, entitled "Reeve Raps Graft; Corruption" made no reference directly or indirectly to any one

of the defendants. No innuendo or implication is contained in this article which could be construed as libel of anyone. Its appearance on the front page of the newspaper of defendant as a news item in a political campaign could harm no one.

Second:

The uncontroverted evidence is that the article containing the "story," or report of the setting up of the special ferry fund, recited true facts as given to the reporter from an official source. This is not libel. The handling of the ferry funds, which were public monies, was a violation of the laws of Alaska, namely Ch. 133, Session Laws, 1951, or Sections 12-2-1 and 12-3-1 A.C.L.A. 1949. It could not be libel for defendant to make the statement that plaintiffs had violated the laws of Alaska in the receipt and disbursement of public monies.

Third:

The comments in the article containing the facts about the ferry fund, and in the editorial, which contained the references to Oscar Olson, were fair comment and absolutely privileged. This is for the reason that the facts show, that while no claim is made that plaintiffs stole, or converted any public funds to their own use, the manner of handling the ferry funds, being a violation of the law, made the plaintiffs subject to the provisions of the same law, which Oscar Olson, former Treasurer of Alaska, had violated and for which violation he had been sentenced to prison. This law is found in Section 65-5-63 A.C.L.A. 1949. There could be no libel in

drawing the parallel to the Olson case and even if malice had existed, it would be immaterial.

Dated at Juneau, Alaska, the 18th day of November, 1955.

/s/ H. L. FAULKNER,
Attorney for Defendant.

Denied.

[Endorsed]: Filed November 18th, 1955.

In the District Court for the District of Alaska
Division Number One

Nos. 6725-A, 6726-A and 6727-A

ERNEST GRUENING, et al.,
Plaintiffs,

vs.

EMPIRE PRINTING COMPANY, a Corporation,
Defendant.

DEFENDANT'S REQUESTED INSTRUCTIONS

Members of the Jury:

Instruction No. 1

The three actions above numbered were brought by Ernest Gruening, Henry Roden and Frank Metcalf against the Empire Printing Company, owner and publisher of a daily newspaper called the "Daily Alaska Empire" and published at Juneau.

Since the issues of law and fact are the same in the three cases, they were consolidated for trial and have all been tried together.

The plaintiffs complain that on September 25, 1952, the defendant published certain articles in its newspaper, concerning the three plaintiffs, which injured them and caused them damage. Therefore, these are what is known as libel suits.

The published articles complained of are set forth as Exhibits to the complaints, and also as Exhibits to defendant's answers. You will be given these complaints and answers to take with you to the jury room when you retire.

The plaintiffs, at the time of the publications, were all public officials. Plaintiff Ernest Gruening was governor of Alaska; Roden was Territorial Treasurer, and Metcalf was Highway Engineer. These three constituted the Board of Road Commissioners of Alaska.

Instruction No. 2

There is no statute in Alaska which defines civil libel; that is the libel which plaintiffs claim is involved in these cases. Many states have laws which do define civil libel, but we have no such statutes in Alaska. Therefore, the definition which you must adopt is what is known as the common law definition. The common law definition of libel is:

> "Every false and unprivileged publication which exposes a person to hatred, ridicule, con-

tempt or obloquy or causes him to be shunned or avoided or which tends to injure him in his occupation."

Golden North Airways vs. Tanana Pub. Co., 218 Fed. 2nd, 612 (U. S. Court App., 9th Cir.) at page 623.

You will note that to constitute libel, the publication must be false and unprivileged. It is not enough that it be false if it is privileged, and it is not enough if it be true even though it be unprivileged. The publication must be both false and unprivileged.

Instruction No. 3

The court instructs you that the facts reported in the published articles complained of are established by the evidence in this case. The only thing remaining for you to consider is whether the comment on those facts was fair comment and privileged criticism. Fair comment is not libel. (Golden North Airways vs. Tanana Pub. Co., 218 Fed. 2d, p. 612 at p. 627; U. S. Ct. of Appeals, 9th Cir.)

"Privileged criticism" or "privileged publication" arises where the publication contains a correct or substantially correct statement of facts and the criticism is based on those facts. The general rule is:

"(1) Criticism of so much of another's activities as are matters of public concern is privileged if the criticism, although defamatory,

"(a) is upon,

"(I) A true or privileged statement of fact, or

"(II) upon facts otherwise known or available to the recipient as a member of the public, and

"(b) represents the actual opinion of the critic, and

"(c) is not made solely for the purpose of causing harm to the other."

Restatement Law of Torts: Sec. 606, p. 275.

Instruction No. 4

The plaintiffs complain of the publication of certain articles in defendant's newspaper, all of which are set up in the Exhibits to the complaint, and referred to in paragraph 6 of the amended complaint of Ernest Gruening, No. 6726-A. The defendant admits the publications. Plaintiffs, in their complaint, say that the publications were "false, scandalous, defamatory and libelous," and the plaintiff, Gruening and the other plaintiffs allege that they were the "culmination of a campaign of misrepresentation, falsehood and calumny" by the defendant against plaintiff Gruening; that they were "wilful, wrongful and malicious and intended and designed to injure, disgrace and defame him" and "bring him into public disgrace and contempt." Therefore, the plaintiffs allege malice. "Malice" in its common acceptation means ill will toward some person. In

its legal sense it applies to a wrongful act done intentionally, without legal justification or excuse. One may do an act wilfully and yet be free from malice.

(Black's Law Dictionary.)

The defendant, in its answers, denies that the articles complained of were false, defamatory, scandalous or libelous. It alleges that the articles were mostly facts obtained from official sources, with certain comments thereon, and that the whole articles complained of, were privileged, and the comments by defendant were based on the facts and were what is known as fair comment and privileged criticism. Defendant further alleges that it is the function and duty of a newspaper to publish such facts to taxpayers, voters and to all inhabitants of the Territory, and to make such comments, express such opinion, and draw such conclusions for the benefit of the public, by way of criticism or otherwise as the facts warrant. Defendant further states in its answers, that there was no malice in the publications and that they were made solely in the public interest.

You are instructed that malice means actual evil-mindedness. There is no presumption of the existence of malice in any libel suit and when malice is claimed, it must be proved from an interpretation of the writing, its malignity, or intemperance by showing recklessness in making the charge, perniciousness in circulating or repeating it, the situations and

relations of the parties, the facts and circumstances surrounding the publication, and by its falsity.

Coleman vs. McLennan, 98 Pac. 281, at pp. 291-292.

Instruction No. 5

You are instructed that you are to disregard the article complained of which bore the headline, "Reeve Raps Graft, Corruption." It has not been shown that this article even remotely refers to any one of the plaintiffs. Furthermore, that appears from reading the article. It has no connection with anything else which appears in the "Empire" on September 25, 1952, and therefore should have no place in your deliberations.

Instruction No. 6

You are instructed that there can be no dispute about the facts published with reference to the setting up of the Special Ferry Fund, and of the receipts and disbursements of moneys in connection with the operation of the "Chilkoot" or Haines ferry. This was done on the express authority of plaintiffs acting as the Board of Road Commissioners for Alaska. I instruct you that this was a violation of the laws of Alaska.

Section 14 of Chapter 133, S.L.A. 1951, reads as follows:

"All receipts from any source whatever shall be forwarded to the Territorial Treasurer each day, or

as promptly as practicable, and at the same time a report of all receipts since the last previous report and of the disposition thereof shall be submitted to the Commissioner of Finance by the depositing agency. All monies received by the Treasurer during any month shall be credited by him and by the Commissioner of Finance to the proper funds not later than the first day of the following month."

Section 28 of Chapter 133, S.L.A., 1951, reads as follows:

"Section 7-1-6, sub-section (b), A.C.L.A., 1949, is hereby repealed and re-enacted so as to read as follows:

"Section 7-1-6. (b-1) The Treasurer shall disburse public monies by check only and then only upon warrants drawn upon him by the Commissioner of Finance or as otherwise provided by law, not inconsistent with this Act. Such warrants shall be paid by the Treasurer when presented and from proper appropriations, but funds shall be retained in the Treasury to meet payments of all warrants issued prior to the ones presented and paid, and the Treasurer shall keep such records as will accurately reflect the receipts of and checks issued against the general and each special fund, the cash balance available for disbursement in each such fund, all bank balances and other records necessary to reflect the current cash position and effectuate treasury and bank reconciliation."

Sub-section (b) of Section 11, Chapter 133, S.L.A. 1951, reads as follows:

"(b) No payment shall be made and no obligation shall be incurred against any fund, allotment, or appropriation unless the Commissioner shall first certify that there is a suffcient unencumbered balance in such fund, allotment or appropriation, after taking into consideration all previous expenditures and outstanding obligations, to meet the same. Every expenditure or obligation authorized or incurred in violation of the provisions of this Act shall be deemed illegal, and every official knowingly authorizing or making such payment, or taking part therein, and every person receiving such payment knowing it to be unlawful, or any part thereof, shall be jointly and severally liable to the Territory for the full amount so paid or received. If any appointive officer or employee of the Territory shall knowingly incur any obligation or shall authorize or make any expenditure in violation of the provisions of this Act, or take part therein, it shall be ground for his removal by the appointing authority, and if the appointing authority be other than the Board of Administration and shall fail to remove such officer or employee, the Board of Administration may exercise such power of removal, after giving notice of the charges and opportunity for hearing thereon to the accused officer or employee and to the appointing authority."

It is also undisputed that the certified public accountants and auditors who audited the books and

accounts of the Territory; its boards, agencies and officials for the years 1951-2, found discrepancies in the special ferry fund account and a shortage of $300.58, and that they also found that the accounts had not been accurately kept, but kept in such manner that it was impossible to ascertain from any source the exact status of the ferry funds.

Instruction No. 6

You are instructed that there can be no dispute about the facts published with reference to the setting up of the Special Ferry Fund, and of the receipts and disbursements of moneys in connection with the operation of the "Chilkoot" or Haines ferry. This was done on the express authority of plaintiffs acting as the Board of Road Commissioners for Alaska. I instruct you that this was a violation of the laws of Alaska.

Section 12-2-1 ACLA 1949 reads as follows:

"Every officer, board, commission or bureau authorized to collect or receive any fees, licenses, taxes or other money, and every office, commission or bureau of the United States, or other authorized agency authorized to collect any fees, licenses, taxes or other money belonging to this Territory, shall account for and pay such fees, licenses, taxes or other money, less any fees he may be entitled to under existing law, to the Territorial Treasurer at least once each month and the same shall be covered into the general fund."

Section 12-3-1 reads:

"Disbursing officers of the Territory of Alaska shall (1) disburse moneys only upon, and in strict accordance with, vouchers duly certified by the head of the department, establishment or agency concerned, or by an officer or employee thereof duly authorized in writing by such head to certify such vouchers; (2) make such examination of vouchers as may be necessary to ascertain whether they are in proper form, duly certified and approved, and correctly computed on the basis of the facts certified; and (3) be held accountable accordingly."

It is also undisputed that the certified public accountants and auditors who audited the books and accounts of the Territory; its boards, agencies and officials for the years 1951-2, found discrepancies in the special ferry fund account and a shortage of $300.58, and that they also found that the accounts had not been accurately kept, but kept in such manner that it was impossible to ascertain from any source, the exact status of the ferry funds.

Instruction No. 7

In the articles complained of, it is stated that the case closely parallels that of Oscar Olson in the receipt and disbursement of public funds.

You are instructed that since Olson pleaded guilty in this court to embezzlement and since the articles, as written, accused the plaintiffs of illegally receiving and disbursing public funds, the comparison

with the Olson case is not a comment but a fact. The law defining the crime of embezzlement covers cases where public funds are converted by the defendant to his own use and also where they are not received and disbursed in accordance with the statutes of the Territory. It also covers deposits in bank accounts of public funds without authority of law. All of these acts constitute embezzlement so that in this connection there is no difference in law between the acts of Olson and the acts of the plaintiffs in this case and the parallel was a fact and its publication, therefore, would not be libel.

Instruction No. 8

The comment and criticism in this case complained of is the parallel drawn to the Oscar Olson case. The facts show that Olson, a former Treasurer of Alaska, had also set up a private bank account contrary to law. He embezzled public funds, causing a loss to the taxpayers. For this he was indicted and imprisoned.

The defendant avers in its pleading that its comment and criticism of plaintiffs did not imply that they had stolen any funds, and it now claims that the parallel consisted of the violation of the law and the loss of public funds in both cases. In the one case the monies were lost through theft; in the other case through some as yet unexplained means. In both cases there was a violation of Territorial law and a loss of public funds. Defendant says this is the parallel meant.

In considering whether defendant's comment was fair and its criticism justified, you must not consider whether you, or any one of you would have made the same or a similar comment. You must consider only whether defendant, its reporters, editors or manager, in good faith considered it to be fair comment and privileged. The test is whether a fair minded person might reasonably draw the same inference from facts truly stated, and that the inference represents the honest opinion of the writer.

Foley vs. Press Pub. Co.,
235 N.Y. Supp. 340.

It is not, therefore, what the jury feels its members would have done or said; but whether they believe the publisher of the article honestly thought, in good faith, the comment made on the facts, was fair comment and privileged. It is sufficient if a reasonable man may honestly entertain such an opinion.

Instruction No. 9

In connection with the intention of the publisher in drawing the parallel to the Olson case, you should take into consideration the statement published on the front page of the Empire on September 26th, the day after the publication of the articles complained of, in which it is stated that no charge of theft was implied and that defendant did not wish to be misunderstood in this respect. This statement is Exhibit D in the answers.

You should also take into consideration the fact that defendant opened its columns to plaintiffs on

the same day as the articles complained of were published, and that their explanations in full were published on the same day and on the same page of the paper. This explanation of their actions is set forth on plaintiff's Exhibit "A" to their complaints.

Instruction No. 10

It is admitted that on the day following the publications complained of, the defendant published in a prominent place on the front page of its paper for that day, a statement that the articles concerning the plaintiffs, published on September 25, 1952, should not be taken to mean that the defendant had charged plaintiffs with theft or misappropriation of funds. This article is set forth in Exhibit "D" to each amended answer.

This must be considered by you only if you first find plaintiffs or any of them were damaged by the publications on September 25th. It should then be considered in mitigation or reduction of any damages which you might find, if you should find that plaintiffs suffered any such damages.

You are instructed, if you find this statement published on September 26, 1952, to have been fair and unequivocal, you should consider its bearing on defendant's defense of lack or absence of malice.

(Am. Jur. Vol. 33 p. 202, sec. 218.)

Instruction No. 11

All the plaintiffs were, at the time of the publication complained of, public officials. The Gover-

nor was an appointed official and the Treasurer and Highway Engineer were elected by the voters.

Public officials enjoy certain unqualified privileges in connection with their spoken and printed statements to other public officials and to the general public, and they possess immunity for almost any press release they care to make, so long as it is more or less in connection with general matters committed by law to their control or supervision.

Spalding vs. Vilas,
161 U.S. 483.

Matson vs. Margiotti,
88 Atl. 2nd 892.

Glass vs. Ickes,
117 Fed. 2nd 273.

Mellon vs. Brewer,
18 Fed. 2nd 168.

Conversely criticism and comment, even though severe and extravagant, of public officials is more readily justified than criticism of persons in private life.

Publications by which it is sought to convey pertinent information to the public in matters of public interest are permitted wide latitude. In controversies of a political nature, in particular, the circumstances often relieve statements, which might otherwise be actionable, of possible defamatory imputations. Mere expressions of opinion or severe criticism are not libelous if they clearly go only

to the merits or demerits of a condition, cause or controversy which is under public scrutiny, even though they may adversely reflect upon the public activities or fitness for office of individuals who are intimately connected with the principal object of the attack.

(Howard vs. Southern California Associated Newspapers;

213 Pac. p. 402 cited by U. S. Court of Appeals in Golden North Airways case 218 Fed. 2nd at page 628.)

In all matters that are entirely of a public nature, such as the conduct of public officials, the proceedings and acts of all persons who are responsible to the public at large, the proceedings, acts and conduct are deemed to be public property, and all bona fide and honest remarks upon such persons and their conduct may be made with perfect freedom.

Coleman vs. McLennan,
98 Pac. 281.

A newspaper's right to comment on facts, criticize and draw inferences from facts pertaining to the acts of public officials is the same as that of an individual in his conversation with other individuals.

What one may lawfully speak, he may lawfully write and publish.

Yankwich "It's Libel or Contempt If You Print It" page 303 and cases there cited.

Instruction No. 12

The plaintiff, Frank Metcalf, was at the time of the publications involved in this case, a candidate for re-election to the office of Highway Engineer. That fact allows a newspaper more latitude in commenting on his official acts than would be allowed if he were in private life and not a candidate. This is because the public has the right to be informed of the qualifications and to hear and read every honest statement either commending him or criticizing him.

It is fit and proper that newspapers should be free to give the public all facts obtainable about candidates for public office and to make all honest comment on those facts. It is one thing to publish false statements as facts and then to comment unfairly on those statements, and quite another thing to comment on actual facts, and draw conclusions and publish opinions which may adversely affect those whose acts and conduct have been correctly and truthfully reported. I repeat: that full and free discussion of all acts of officials which affect the public is sanctioned by the law. Honesty is least likely to suffer serious injury from full and free discussion of facts and comment thereon, even when that free discussion and comment affects it unjustly.

Coleman vs. McLennan,
98 Pac. 281.

Instruction No. 13

In considering this case, bear in mind what I have said about the facts contained in the published articles which are the basis of the complaints. These facts have not been controverted. Therefore they stand as true, and you will not have any duty with reference to their determination.

But in arriving at correct answers to the questions the court will submit to you in connection with your verdict, you must take the published articles as a whole, and hold them up figuratively by the four corners, and first taking the established facts as true, determine whether any reasonable and honest person; (not necessarily yourselves) but any reasonable and honest person, acting in good faith, would have felt justified in the comment and criticism.

You are instructed that "if the public is to be aided in forming its judgment upon matters of public interest by a free interchange of opinion, it is essential that honest criticism and comment, no matter how foolish or prejudiced, be privileged. The fact that the criticism may be fantastic is immaterial, and the extravagant form of its expression is unimportant. It is necessary, however, that the comment have some relation to the facts upon which it is made. If it has not, it may well be taken to imply the existence of other undisclosed defamatory facts."

Restatement: Torts:
Sec. 606, p. 277-8.

You are therefore not to attempt to pass on the nature of the comment and criticism alone, but in connection with the facts in the article. A cardinal rule of the law of libel is one which flatly prohibits any attempt to wrench a word or a phrase of an article out of context and base an action thereon. The whole of the article must be considered.

Rose vs. Indianapolis Newspapers, Inc.,
213 Fed. 2nd p. 227.

Instruction No. 14

In this case, the plaintiffs complain that defendant, in the publication of the articles on September 25, 1952, imputed to them the commission of the crime of theft. Defendant denies that any such imputation was intended, and that the articles cannot be so interpreted.

A "crime" is defined in section 65-2-1 ACLA 1949 as follows:

"That a crime or public offense is an act or ommission forbidden by law, and punishable, upon conviction, by either of the following punishments:

"First. Death;
"Second. Imprisonment;
"Third. Fine;
"Fourth. Removal from office;
"Fifth. Disqualification to hold and enjoy any office of honor, trust or profit.

"Embezzlement of public money" is defined in section 65-5-63, ACLA, 1949. This section reads:

"That if any person shall receive any money whatever for said Territory or for any county, town, or other municipal or public corporation therein, or shall have in his possession any money whatever belonging to such Territory, county, town or corporation, or in which said Territory, county, town or corporation has an interest, and shall in any way convert to his own use any portion thereof or shall loan, with or without interest, any portion thereof, or shall neglect or refuse to pay over any portion thereof as by law directed and required, or when lawfully demanded so to do, such person shall be deemed guilty of embezzlement, and upon conviction thereof shall be punished by imprisonment in the penitentiary not less than one nor more than fifteen years, and by fine equal to twice the amount so converted, loaned, or neglected or refused to be paid, as the case may be."

If you find that the section of the code last above set forth, was violated by plaintiffs, it would not matter what defendant intended to impute in this respect, and you must find a verdict for the defendant.

Instruction No. 15

In the matter of damages, I instruct you that you should consider this only if you should find that the two articles complained of were libelous; that is, that the comment made on the admitted facts was not fair comment and privileged criticism. If you do find the comment to have been "fair comment" as I have defined that term for you, then there is

nothing further for you to consider, for as I have already instructed you, "fair comment" is not libel.

(Golden North Airways vs. Tanana Pub. Co., supra.)

If the criticism is what is known as "privileged criticism" as herein defined, and there was no malice in the publications, you must find for the defendant.

If, however, you do not first find the comment to have been fair comment, or the criticism to have been privileged under the circumstances, then, and only then should you consider damages.

The plaintiff, Ernest Gruening, in his complaint, alleges that by reason of the public disgrace and injury to his good name, he has been damaged to the extent of $100,000.00. He seeks the further sum of $100,000.00 as punitive damages, or what is sometimes called "smart money." This, he seeks by way of punishment of defendant for the publications. The plaintiffs Roden and Metcalf claim that they have each been damaged in the sum of $100,000.00 on account of the alleged public disgrace and injury to their good names. They do not seek any punitive damages.

It is for you to consider, if you should first find that the publications were not fair comment and privileged criticism, whether either one or all of plaintiffs have been publicly disgraced and their good names injured by the publications; that is to

say, by the opinions of defendant on the established facts.

If you find that no such injury was suffered by Roden or Metcalf, then your verdict on their complaints, must be for the defendant.

In the case of Ernest Gruening, the same instruction applies to his claim for damages on account of public disgrace and injury to his good name.

Punitive damages are allowed only by way of punishment of a wrongdoer. Therefore, if you find that plaintiff, Ernest Gruening, is not entitled to the general damages he claims, or any part of it, and that there was no malice in the publications, that plaintiff is not entitled to punitive damages.

Malice, as I have defined it must be shown by the evidence to exist. It may be established by all the facts and circumstances, but it is never presumed.

"No question of exemplary or punitive damages is involved in an action for libel where there is no evidence of actual malice or a reckless disregard of plaintiff's rights."

(News Leader Co. vs. Kocen:
3, S.E. 2nd, 385: 122 A.L.R. 842).

Therefore, you will see that in all cases punitive damages or "smart money" are not to be allowed unless it is first shown that actual damages have been established first, and that the defendant was actuated by malice.

In any event, the burden is on the plaintiffs to prove damages and unless they have shown that they suffered some pecuniary damage or loss, your verdict must be for the defendant regardless of any other consideration.

Instruction No. 16

In these cases, as in all trials the plaintiffs have the burden of proving their cases by a preponderance of the evidence: that is to say by the greater weight of the evidence. You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number, or against a presumption or other evidence satisfying your minds.

In this connection you are instructed that the burden of proving malice is on the plaintiffs. The defendant is not required to prove absence of malice.

(Curtis Pub. Co. vs. Fraser:
209 Fed. 2nd, p. 1.)

You will see, therefore, that the burden is on the plaintiffs to prove, by preponderance of evidence, to your satisfaction the material allegations of the complaints before they are entitled to recover anything from the defendant.

Malice has been described as follows:

"The malice which avoids the privilege is actual or express malice, existing as a fact at the time of the communication and which inspired or colored it. Such malice exists where one casts an imputa-

tion which he does not believe to be true or where the communication is actuated by some sinister or cruel motive or motives or personal spite or ill will, or where the communication is made with such gross indifference to the rights of others as will amount to a willful or wanton act."

International & Gnr Co. v. Edmonston.
222 S.W. p. 185.

Johns v. Association Aviation Underwriters.
203 F. 2d 208.

In this connection you are instructed that there is no allegation in the complaints that the defendant did not believe the statements published to be true.

The law raises a presumption of good faith on the part of the defendant and even negligence on the part of the defendant cannot take the place of malice. There is neither allegation nor proof that the defendant did not believe the statements which it published to be true, and in the absence of such allegation and proof, no malice can arise in this case.

Instruction No. 17

Your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence, and the instructions of the court.

You should judge the case solely on the evidence and that alone, and you should not allow your

acquaintance with, friendship for, or hostility to any of the parties, witnesses or attorneys, influence you in deciding any of the questions that will be submitted to you for determination.

Instruction No. 18

A witness wilfully false in one part of his testimony may be distrusted in other parts.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other to contradict: and, therefore, if the weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

In this connection you are instructed that the plaintiffs have not produced here the records of the Chilkoot Ferry fund transactions. These records should be in the office of the Highway Engineer and all documents, checks, bank statements, and other instruments and papers in writing concerning the bank account which is mentioned in the pleadings herein should be on file in either the office of the Territorial Treasurer or the office of the Highway Engineer. The certificates of these officials and of the Commissioner of Finance, who succeeded to the office of Auditor, have been introduced in evidence showing that no canceled checks are in either of their offices. It was the duty of the plaintiffs to have seen that these checks, other instruments and

bank statements were filed in the proper office and you are instructed that if any person having custody of any public record, book, paper or writing shall wilfully destroy, secrete or mutilate the same, he is guilty of a crime and liable to punishment under the provisions of Section 65-7-21, ACLA 1949.

The plaintiffs were all Territorial officials at the time these records were made and at the time the checks were issued, and it was their duty to produce the records before you or to explain why they were not produced and what disposition was made of them.

Sections 65-7-21-22-23 read as follows:

"65-7-21. Public Records: Destroying, Secretion or Mutliation: Act of Custodian: Act of Attorney. That if any person, having the legal custody of any public record, book, paper, or writing, shall willfully destroy, secrete, or mutiliate the same: or if any attorney shall willfully destroy, secrete, or mutiliate any such record, book, paper, or writing, or shall wrongfully take the same from the person having the legal custody thereof, or having obtained possession of such record, book, paper, or writing lawfully, shall wrongfully refuse or neglect to return or produce the same when lawfully required or demanded so to do, such person or attorney, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than six months nor more than one year, or by imprisonment in the county jail not less than three months nor

more than one year, or by fine not less than one hundred nor more than five hundred dollars.

"65-7-22. Act of Officer Having Custody. Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office or placed in his hands for any purpose, who is guilty of stealing, wilfully destroying, mutilating, defacing, altering or falsifying, removing or secreting the whole or any part of such record, map, book, paper, or proceeding, or who permits any other person so to do, is punishable by imprisonment in the penitentiary not more than five years, or by a fine of not more than five thousand dollars, or by both such fine and imprisonment.

"65-7-23. Act of Person Not Officer. Every person not an officer such as referred to in the preceding section, who is guilty of any of the acts specified in that section, is punishable by imprisonment in the penitentiary not to exceed three years, or by a fine not to exceed two thousand dollars, or by both such fine and imprisonment."

Instruction No. 19

You should not consider any evidence sought to be introduced but excluded by the court, nor should you consider any evidence that may have been stricken from the record by the court.

You should consider all the instructions together and not disconnectedly, and you should consider all

the evidence calmly and dispassionately, and not allow any bias in favor of, or prejudice against, any of the parties or witnesses to influence you in your deliberations.

Instruction No. 20

Plaintiffs claim the setting up of the special ferry fund and the disbursement thereof were done for the sake of expediency and convenience.

You are instructed that expediency and convenience are no excuse for violation of the law.

Instruction No. 21

You are instructed that Oscar Olson, the former Territorial Treasurer, was convicted for violation of Sec. 7-1-9 ACLA 1949, which reads as follows:

"If the Treasurer of the Territory of Alaska, or any person exercising the duties of that office, shall fail, neglect or refuse, to account for or pay over, all moneys in his hands as said Treasurer in accordance with law, or shall unlawfully convert to his own use in any manner whatever, or to the use of another not lawfully entitled thereto, or use by way of investment in any kind of property, or loan without authority of law, any portion of the public money intrusted to him for safe keeping, transfer or disbursement, or unlawfully convert to his own use, or to the use of another not entitled thereto, money or other property which may come into his hands by virtue of his office he shall be deemed guilty of the embezzlement of so much of the money

or property as is thus taken, converted, invested, used, loaned, or unaccounted for, and upon conviction thereof he shall be subject to the same punishment as is otherwise provided in the laws of Alaska for the crime of embezzlement."

He was punished under the provisions of Sec. 65-5-63, which reads:

"That if any person shall receive any money whatever for said Territory or for any county, town, or other municipal or public corporation therein, or shall have in his possession any money whatever belonging to such Territory, county, town, or corporation, or in which said Territory, county, town, or corporation has an interest, and shall in any way convert to his own use any portion thereof or shall loan, with or without interest, any portion thereof, or shall neglect or refuse to pay over any portion thereof as by law directed and required, or when lawfully demanded so to do, such person shall be deemed guilty of embezzlement, and upon conviction thereof shall be punished by imprisonment in the penitentiary not less than one nor more than fifteen years, and by fine equal to twice the amount so converted, loaned, or neglected or refused to be paid, as the case may be."

Plaintiffs are charged by defendant with committing acts which parallel the acts of Olson "in the receipt and disbursement of public funds."

It is not charged that either of plaintiffs had stolen or misappropriated public funds to their

own use. In fact it is not stated that Olson had stolen public funds and the judgment in his case (introduced here), does not so state. It adjudges him guilty of a violation of Sec. 7-1-9, which defines the crime of embezzlement by the Treasurer substantially the same as it is defined in Sec. 65-5-63 for all other persons.

Instruction No. 22

You are instructed that in all libel actions, the truth of facts published is a complete defense. Motive and purpose are immaterial. If the charges are true, it does not matter whether defendant knew at the time the facts were published they were true, but discovered that afterward, for the truth whenever discovered is a complete defense.

Yankwich, It's Libel or Contempt If You Print It, p. 359-60.

Instruction No. 23

The testimony shows the charge that plaintiff's action in connection with the special ferry fund, paralleled the Olson case in the receipt and disbursement of public funds, is a statement of fact. Defendant claims that the editorial is what is known in the law as "fair comment." Now "fair comment" is essentially opinion based on fact. It must (1) be based on facts truly stated; (2) not contain imputations of corrupt or dishonorable motives on the person whose conduct or work is criticized, save insofar as such imputations are

warranted by the facts; (3) be the honest expression of the writer's real opinion. Fair comment is not libel. Therefore, if you find that the facts set forth in the publications were true or substantially true, and the opinion of the writer was fair comment, your verdict must be for the defendant.

Yankwich Book p. 370-1.
Golden North case, 218 Fed. 2nd p. 627.

The statement in the article complained of that the plaintiffs' action in connection with the special ferry fund paralleled the Olson case in the receipt and disbursement of public funds is a statement of fact. If you find this fact to be true, and the other statements purporting to be facts to be true also, and the opinion or comment contained in the editorial to be fair comment and privileged criticism, your verdict must be for the defendant.

Instruction No. 24

We have stated that to constitute "fair comment" the comment or opinion must be based on facts. This rule, "extends, in the absence of malice, to misstatements of fact." Golden North case, p. 630. Therefore, when malice is not shown, if the facts commented upon are substantially true, the right of fair comment is a complete defense.

Instruction No. 25

In the letter from Neil Moore, the Auditor, to J. Gerald Williams, the Attorney General, dated Au-

gust 25, 1952, and published by defendant on September 25, 1952, he calls attention to a violation by plaintiffs of certain statutes found in the Alaska Compiled Laws 1949.

However, in 1951, the legislature had passed Chapter 133, Session Laws, 1951. Section 14 of the law reads:

"All receipts from any source whatever shall be forwarded to the Territorial Treasurer each day, or as promptly as practicable, and at the same time, a report of all receipts since the last previous report and of the disposition thereof, shall be submitted to the Commissioner of Finance by the depositing agency. All monies received by the Treasurer during any month shall be credited by him and by the Commissioner of Finance to the proper funds not later than the first day of the following month."

Section 3 reads:

"The provisions of this Act shall apply to all agencies of the government of the Territory. As used in this Act, the term agency or agencies shall mean and include every department, board, bureau, commission, officer, employee and other instrumentality of the Territory, except municipalities and other political subdivisions of the Territory, with the limitations hereafter provided."

Section 50 of Chapter 133 reads:

"In case any section, provision or part of this Act or any application thereof shall be declared

invalid, it shall not in any way affect any other section, provision, or part hereof, or any other application hereof."

These sections of the law above quoted were in force and effect during the entire year 1952 and they were in full force at the time the plaintiffs, acting as the Board of Road Commissioners, set up the special ferry fund and authorized the purser, Robert E. Coughlin, to make payments from this fund. Therefore, the setting up of the fund in the Behrends Bank, and the payments therefrom, were in violation of the laws of Alaska.

Instruction No. 26

The statement in the editorial, referring to Oscar Olson sitting in his prison cell dreaming of the days when he thought Territorial laws were only for underlings, is at most an expression of the writer's opinion, and if based on true facts contained in other portions of the publication, it is privileged and not libel.

Instruction No. 27

It is admitted that plaintiffs, as Board of Road Commissioners, authorized the handling of the ferry funds in the manner described in the publications complained of. They constituted Robert E. Coughlin purser of the ferryboat Chilkoot, their agent to receive these funds and to disburse them by check without any counter-signature. Therefore, Coughlin became the agent of the plaintiffs and his acts in

the receipt, disbursement and handling of the ferry funds were the acts of plaintiffs.

If an agent is appointed to perform an illegal act, and he does so, the one appointing him is responsible criminally, and, if a tort is committed he is civilly liable.

Restatement: Agency, Vol. 1, Sec. 19.

The possession of the ferry funds by Coughlin was the possession by the plaintiffs. The disbursement of the funds by Coughlin was the same as if it had actually been done personally by plaintiffs. The loss of any portion of the funds would therefore be attributable to plaintiffs.

Instruction No. 28

You are instructed that under the laws of Alaska there existed no authority in 1951 and 1952 for the Territory to operate a ferry; that no appropriation was made by the legislature for the purchase of the Ferry Chilkoot and none was made for its operation and the purchase and operation were therefore without sanction of law. You are instructed that funds of the Territory were used in the purchase of the ferry and Territorial funds were used to pay the deficit from operation. Notwithstanding the fact that there was no authority in law to purchase the ferry, having used Territorial funds for that purpose and having used Territorial funds in the operation of the ferry, all laws applicable to the receipt and disbursement of public funds should have been applied in the handling of these monies.

Instruction No. 29

To constitute a violation of Sec. 65-5-63 ACLA 1949, it is not necessary that the person charged should have actual physical possession of the money loaned, converted to his own use or not deposited with the Treasurer as directed by law. It is sufficient that he had it in his control.

People v. Knott,
104 Pac. 2nd 33.

Garner v. State,
158 So. 546.

State v. Workman,
114 S.E. 276.

Allred v. United States,
146 Fed. 2nd 193 (Alaska Case), Ninth Circuit.

Instruction No. 30

The court submits to you certain specific questions which you will be required to answer by your verdict, a form of which is submitted to you. This form of verdict is self explanatory. You will be given these instructions, the pleadings, exhibits and the form of verdict. Upon retiring to the jury room, you will elect one of your number foreman, and he or she will sign the verdict which you must first unanimously agree upon.

A separate form of verdict is given you in each of the three cases. You will first consider the ques-

tion No. 1 in each case and if you answer "Yes" to that question, you need not answer the remaining questions.

[Endorsed]: Filed November 18, 1955.

[Title of District Court and Cause.]

Nos. 6725-A, 6726-A, 6727-A

COURT'S INSTRUCTIONS TO THE JURY

No. 1

Ladies and Gentlemen of the Jury:

It now becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations upon and disposition of this case. When you were accepted as jurors you obligated yourselves by oath to try well and truly the matters at issue between the plaintiff and the defendant in this case, and a true verdict render according to the law and the evidence as given you on the trial. The oath means that you are not to be swayed by passion, prejudice or sympathy, but that your verdict should be the result of your careful consideration of all the evidence in the case. It is equally your duty to accept and follow the law as given to you in the instructions of the Court.

On the other hand, it is the exclusive province of the jury to declare the facts in the case, and your decision in that respect, as embodied in your verdict,

when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore, the greater ultimate responsibility in the trial of the case rests upon you, because you are the triers of the facts.

No. 2

Jurors are chosen and sworn in civil cases to try issues of fact presented by the allegations of the complaint of the plaintiff and the answers thereto of the defendant.

Three such civil cases have been consolidated for trial in this instance, each of which involves the same issues of fact except as hereinafter noted.

It is admitted by the complaint and answer in each case that the plaintiffs were, at the time of the libel complained of, the Treasurer, Governor, and Highway Engineer of the Territory of Alaska and that under existing Territorial law such three officials constituted what was known as the Territorial Board of Road Commissioners, and as such performed all duties assigned to it by the laws of the Territory. It is further admitted that the defendant was engaged in the printing and publishing business, and was the publisher and proprietor of the newspaper known as the "Daily Alaska Empire," printed and published at Juneau, Alaska, with a daily circulation in said town of Juneau and elsewhere in said Territory and other places.

It is also admitted that before the commission of the acts complained of, the plaintiffs, acting as said

Board and pursuant to law, purchased and acquired for and on behalf of the Territory the "Motor Vessel Chilkoot," and caused the same to be operated in the waters of southeastern Alaska for the transportation of passengers and the carrying of freight, and that the cost and expenses thus incurred were paid in part by the Board out of revenues earned by the vessel.

It is also admitted that before commission of the acts complained of, one Oscar Olson had been the Treasurer of the Territory and that said Olson, upon indictment found by the grand jury for the Territory and his plea of guilty, was convicted of embezzlement of funds and money belonging to the Territory and coming into his possession as the then Treasurer of said Territory and was at all times herein mentioned confined in a penitentiary on McNeil's Island upon his sentence for said offense.

The complaint in each case alleges that on the 25th day of September, 1952, the defendant published in said newspaper certain false, scandalous, defamatory and libelous headlines, articles, and editorial, the complete text of which is offered in evidence as Plaintiff's Exhibit No. 1. Complaint is particularly made as to the following material appearing on the front page of said newspaper:

"Headline:

"Bare 'Special' Ferry Fund

"Sub-headline:

"Reeve Raps Graft, Corruption

"Sub-headline:

"Gruening, Metcalf, Roden, Divert 'Chilkoot' Cash to Private Bank Account

"News Article:

"Entire article appearing two right-hand columns, front page, including continuation right-hand column, page two.

"Editorial:

"Entire editorial entitled 'Start Talking, Boys' center front page."

It is further alleged that said headlines, articles and editorial were maliciously published of and concerning the plaintiffs and were intended to and did expose plaintiffs to the scorn, hatred, and contempt of the general public and residents of Alaska and their friends and neighbors and that the same were intended to convey and did convey the belief that the plaintiffs were dishonest and corrupt and that they were guilty of the crime of embezzlement and of converting funds belonging to the Territory to his or their own use in violation of the law; further, that the libel complained of was the culmination of a campaign of misrepresentation, falsehood and calumny against said officials and was wilfully, wrongfully, and maliciously designed to injure, disgrace and defame plaintiffs and to bring them into public disgrace and contempt.

Each plaintiff alleges that by reason of such false, malicious and defamatory publication he has been publicly disgraced and injured in his good

name, and damaged. Plaintiffs Henry Roden and Frank Metcalf allege such damages in the sum of $50,000.00 each. Plaintiff Ernest Gruening claims such damage in the sum of $100,000.00. Plaintiffs Roden and Metcalf also ask for punitive damages in the sum of $50,000.00 each; and plaintiff Gruening also prays for punitive damages against the defendant in the sum of $100,000.00.

The defendant in its answer has admitted the publications referred to in their entirety, but denies that any portions of the articles or editorial were false, scandalous, defamatory or libelous. Defendant has also denied that said headline, articles, and editorial were maliciously published or were intended to and did expose plaintiffs to the scorn and hatred or contempt or ridicule of the public or others; and also alleges that the reputations of the plaintiffs have remained the same since the publication of the articles complained of, and hence plaintiffs were not damaged.

The denial of these allegations by the defendant places upon the plaintiffs the burden of proving such allegations by a preponderance of the evidence, except as hereinafter defined.

By way of affirmative defenses to the complaint, defendant alleges in substance:

(1) that the facts stated in the articles complained of are true and correct and that all opinions expressed in setting forth the facts are a fair comment thereon and privileged criticism;

(2) that the matters covered by the publication were matters of public concern, concerning the official acts of Territorial officers who may be up for re-election or reappointment, and that such articles, comments and opinions were justifiable criticisms in the public interest;

(3) that in the same issue of the newspaper and immediately adjoining the article complained of, the defendant published the explanation of the plaintiffs Metcalf and Roden, two members of the said Board, which was published for the purpose of giving to the public such explanation as the members of the Board desired to give regarding the handling of the funds referred to; that at the time of such publication, the Governor was not available for comment; and that there was no malice in the publications complained of:

(4) that on the next day, September 26th, the defendant caused to be published in effect a denial of any accusation against the plaintiffs of embezzlement of public funds, stating that such was not the intention of the article to infer that there had been such misappropriation or theft of funds.

The burden of proving these affirmative allegations by a preponderance of the evidence is upon the defendant.

No. 3.

You are instructed that any publication of false and unprivileged defamatory printing or writing which tends to expose a person to public hatred,

contempt, or ridicule, or to deprive him of the benefits of public confidence, or to disgrace him, or which tends to injure him in his reputation or business or occupation, when published of him maliciously, constitutes libel.

You are further instructed that any such publication which imputes to the person referred to the commission of a crime is libelous per se, that is, a libel in and by itself; and where the matter published is libelous per se, the law presumes that it was published maliciously and that damage resulted. It is also the law that it is libelous per se to falsely impute to a person in his capacity as a public officer, fraud or dishonesty in the conduct of his official duties; and any libel affecting him in his official capacity and of such nature that, if true, would be cause for his removal from office, is actionable per se.

These presumptions of law make it unnecessary for the person to whom the commission of crime is imputed to prove malice or injury; but he may nevertheless make such proof for the purpose of showing the extent or degree of malice and of the injury and damage to his reputation and for the purpose of enhancing his recovery.

However, these presumptions of law, as well as such other proof, may be rebutted by competent evidence; and the defendant may show that there was no malice and that no damage resulted. The burden of proof in this respect is upon the defendant.

In this connection the law makes a distinction between malice in a legal sense, which means a wrongful act done intentionally, without just cause or excuse, and actual malice, which means ill will, enmity, hate, spite, or purpose to injure. The presumption above mentioned refers to legal malice, which need not be proven, whereas actual malice must be proven. In considering the question of legal malice and whether or not the presumption is overcome by evidence you need only consider whether the publication, if false, was made intentionally, without such just cause or excuse. The subject of actual malice, as extending or mitigating the injury, will be discussed hereafter relating to the matter of assessment of damages.

No. 4.

You are instructed that the publication complained of, particularly with reference to the words:

"There have been thousands of dollars of illegal receipts and disbursements; the case closely parallels that of Oscar Olson, former Territorial Treasurer, who is now serving a prison term at McNeil's Island penitentiary for violating the law in the receipt and disbursement of public funds,"

together with other reference to the Olson case, and reference to criminal prosecution, imputes to the plaintiffs the commission of a crime; that is, clearly imputes such without the aid of any extrinsic evidence, and is therefore libelous per se. The legal presumptions of malice and injury above mentioned

must therefore be given effect by you, for it is the exclusive province of the Court to declare to you whether or not such printed matter is as a matter of law libelous per se.

Therefore, unless you find such presumptions overcome by competent evidence, and unless you find by a preponderance of the evidence that such publication was in fact true, or was privileged, as below defined, you must find for the plaintiffs and it will be your province then only to assess the amount of damages which you find the plaintiffs are entitled to recover. If, on the other hand, you find that such statements and imputations were true, or were published without malice, or were privileged, then you must find for the defendant.

The Court does not here declare or intend to indicate to you whether or not the crime charged, imputed to the plaintiffs, or intended to impute to the plaintiffs, the wrongful theft or misappropriation of public funds. The plaintiffs alleged that such words, together with other references to the Oscar Olson case, and imputations of graft and corruption, impute to them the crime of embezzlement as that crime is commonly understood, that is, the wrongful conversion of public funds entrusted to plaintiffs to their own use, which accusation is admittedly untrue. The defendant denies that there was any accusation of theft of public funds, or any such imputation intended, and contends that the violation of law charged referred only to unlawful receipt and disbursement of pub-

lic funds, which it alleges to be true. This is a question of fact for the jury to determine, from a consideration of all of the evidence in the case, and from a careful consideration of the publications in their entirety, including headlines, and any reasonable imputations or deductions arising therefrom.

In this connection, in determining what was meant by the words used in the publication, you will give to such words their commonly accepted meaning or the sense that such words are commonly understood by persons reading them. It is not necessary that such printed words charge the person directly or openly with the commission of any specific crime nor even that the person accused be specifically named if his identity is clear, but it is sufficient if words are printed which in their ordinary accepted meaning impute to such person wrongful theft or conversion to his own use of public funds, or any other crime. The facts reported in the publication as well as the comment thereon, taken in their entirety, should be given full consideration by the jury in determining this question and all other issues of fact as herein defined.

No. 5.

The defendant seeks to justify the comparison in the published articles and editorial to the Oscar Olson case, as closely parallel to the case of the plaintiffs, upon information given to the witness Daum, author of the articles and editorial, by Neil F. Moore, Territorial Auditor, to such effect, spe-

cifically referring to the statute defining the crime of embezzlement of public money and fixing the punishment therefore, under which said Oscar Olson was said to have been convicted or sentenced, as applying to the acts of the plaintiffs with respect to the handling of the Chilkoot Ferry fund. The statute referred to, being Sec. 65-5-63, ACLA, 1949, provides in full as follows:

"That if any person shall receive any money whatever for said Territory or for any county, town, or other municipal or public corporation therein, or shall have in his possession any money whatever belonging to such Territory, county, town or corporation, or in which said Territory, county, town or corporation has an interest, and shall in any way convert to his own use any portion thereof or shall loan, with or without interest, any portion thereof, or shall neglect or refuse to pay over any portion thereof as by law directed and required, or when lawfully demanded to do so, such person shall be deemed guilty of embezzlement, and upon conviction thereof shall be punished by imprisonment in the penitentiary not less than one nor more than fifteen years, and by fine equal to twice the amount so converted, loaned, or neglected or refused to be paid, as the case may be."

It appears from defendant's Exhibit J, being a certified copy of the judgment and sentence in the Oscar Olson case, that he was convicted under the provisions of Section 7-1-9, ACLA, which particularly defines the crime of embezzlement by the Ter-

ritorial Treasurer. This statute contains language defining such crime in almost identical language to the statute above quoted, but provides that the punishment for such offense shall be the same as is otherwise provided by law for the crime of embezzlement, which refers, as to embezzlement of public money, to Section 65-5-63, quoted above. Therefore Sec. 7-1-9 defined the crime, but Sec. 65-5-63 fixed the punishment, in the Olson case.

You are instructed that in order to constitute the crime of embezzlement of public money upon which a public official may be convicted or sentenced under the provisions of either of these statutes the official accused must either have converted public funds to his own use, or wrongfully loaned such funds, or neglected or refused to pay over any portion of such funds as by law directed. Further that the deposit of any such funds in a bank subject to be withdrawn by check does not constitute in law a loan of such funds.

You are further instructed that aside from the statutes above noted defining the crime of embezzlement of public funds, there is no statute in Alaska making a violation of the law relating to the receipt and disbursement of public funds by Territorial officials a crime, or subject to criminal prosecution. Sections 11-3-8, 12-2-1 and 12-3-1, Compiled Laws of Alaska, referred to in the published letter from Auditor Neil F. Moore to the Attorney General, being a part of Exhibit No. 1, provide for payment of

salaries and expenses of all officers and boards out of appropriations for that purpose, for payment of all fees, licenses, taxes or other money belonging to the Territory to the Treasurer, to be credited by him to the general fund, and for disbursement of public moneys by any disbursing officer of the Territory only upon vouchers certified by the head of the department, which are then referred to the Territorial Auditor for payment. Section 12-2-1 above was repealed by Chap. 133 SLA 1951, known as the "Reorganization Act" which Act, however, contains substantially the same requirements. No penalty is provided for violation of any of these provisions of law; but Section 12-3-3, CLA, provides that the officer or employee approving or certifying a voucher shall be held accountable for and required to make good to the Territory the amount of any illegal, improper, or incorrect payment prohibited by law or which did not represent a legal obligation of the Territory, which liability may be enforced by civil action.

Under the law any taxpayer would also have the right to enjoin any illegal receipt or disbursement of public funds prohibited by these statutes, or to compel any public official to comply therewith, but such does not make any such violation or failure to comply with such statutes a crime, that is, punishable by fine or imprisonment, or removal or disqualification from office.

By this the Court does not intend to comment in any way as to whether or not the actions of the

plaintiffs relating to the "Chilkoot" ferry fund were or were not illegal, which is a matter for the jury; but it is the intention of this instruction only to declare to you the remedy in case there may exist any such illegality.

You are therefore instructed that unless you find from the evidence that the facts reported in the news articles were sufficient to constitute the crime of embezzlement as above defined, no defense as to the justification of truth of the alleged libelous publication, which imputes the commission of a crime or criminal liability, may be based upon the construction of these statutes. There remains to be considered by you the question of whether or not, as contended by the defendant, the "device" used by the plaintiffs as members of the Board in depositing the funds from the operation of the ferry in a special account rather than paying such to the Territorial Treasurer, and in paying operating expenses of the ferry from such account, is a sufficient parallel with the case of Oscar Olson in setting up a special account as shown by the evidence to justify the publication as true. This is a question of fact for the jury to determine from a consideration of all of the evidence in the case.

No. 6.

You are further instructed that if you should find from the evidence that the publication complained of charged or imputed to the plaintiffs the crime of embezzlement of public funds, the defend-

ant must show, to justify the truth of such publication, not only that plaintiffs took the funds accruing from the operation of the ferry, deposited them in a separate account, and paid operating expenses out of such account without vouchers approved by the Auditor, but defendant must also show by a preponderance of the evidence that plaintiffs handled the money wrongfully and fraudulently and with a criminal intent to convert such to their own use. In this connection, you should consider whether or not the plaintiffs handled such funds in good faith, and in the justifiable belief that they had the legal right to do so, without any intent to embezzle such funds or to deprive the Territory thereof.

No. 7.

During the trial of this case considerable testimony has been received concerning the question of whether or not a shortage of money occurred in the handling of moneys in connection with the operation of the ferry "Chilkoot," by the purser.

You are instructed to disregard all of such testimony as it is not relevant to the issues involved. No shortage of moneys in the ferry operating fund is mentioned in the publication of the Daily Alaska Empire of September 25, 1952, and the question of whether or not such a shortage occurred is not made an issue in this case by the pleadings of either the plaintiffs or defendant, or is relevant to the question of the truth or falsity of the publication.

No. 8.

The truth of the words complained of is an absolute defense to an action for libel. If you should find that the words which the defendant used concerning plaintiffs were true in the ordinary acceptance of the meaning of such words, the plaintiffs are not entitled to recover. To be available as such a defense the justification of truth must extend not only to the entire language complained of, but must show the truth of the publication in the sense imputed to it. A mere belief on the part of the defendant of the truth of the publication is not a defense. Accordingly, even though a publication purports to be made on information given by another, such justification must establish the truth of the charge and not merely the defendant's belief that it was true.

The law with respect to privileged publications relates to those wherein the author or publisher acted in the bona fide discharge of a public or private duty, or in the public interest. Every citizen and every newspaper has the right to call to the attention of fellow citizens any maladministration of public affairs or the misconduct of a public officer if the real motive in so doing is to bring about reform of abuses, or defeat the re-election or reappointment of an incompetent officer; hence, publications dealing with political matters and public officers are entitled to a reasonable measure of privilege by reason of the public interest involved therein, as matters of public interest and concern are legitimate subjects of criticism as long as such

criticism is made fairly and with an honest purpose. The limitations upon this rule are that the statements published must be within the bounds of fair comment and honestly made, and must not be motivated by actual malice. Accusations of crime, fraud, or corruption are not privileged unless true. Other criticism of public officers published in good faith and without malice are privileged except that such privilege does not extend to misstatements of fact, and any defamatory publication is actionable if false, regardless of the question of good faith or reasonable belief.

A retraction of libelous words is not a defense to an action for the defamation unless retracted at the time of the publication or as a part of the same publication; hence any retraction published at a later date would not be a defense, although such may be considered by the jury in the matter of mitigation of damages. The publication of statements made by two of the plaintiffs simultaneously with the publication of the matter complained of would not constitute such a retraction unless by the same publication the defendant acknowledged the truth of the statements or explanations made.

The publication of the editorial under date of September 26, 1952, under the heading "Attention" was published, according to the evidence of the defendant, not as a retraction but as an explanation to show that there was no intention to charge the plaintiffs with the theft of public funds. This statement, then, need not be considered by you as a

retraction, which must be full and without reservation, but should be considered by the jury in the matter of mitigation of damages and as bearing upon the question of malice; in other words, whether such publication may reduce or minimize the amount of damages which the plaintiffs may otherwise have suffered.

If you find that the publication was defamatory and libelous and find that it was not true or privileged, then you should consider the matter of damages.

No. 9.

The plaintiffs in each case seek compensatory and punitive damages. The former are intended to compensate for the injury caused and the latter are allowed by way of punishment and to deter the repetition of the wrong or the commission of such wrong by others.

As to compensatory damages, you are instructed that the defendant may be held liable for all damages which were the natural and probable result of the publication of the statements referred to. In this connection, no actual monetary loss need be shown, as general damages presumed from the publication of libelous matter, while not susceptible of being actually measured by dollars and cents, may or may not be found to be substantial and real. You should consider the actual or probable effect of the publication upon the plaintiffs' personal feelings and their standing and reputation both as a

private person and as a public official in the community in which they live and in the territory in which the Daily Alaska Empire is circulated; and the extent of such injury, if any, to such standing and reputation. You may also take into consideration mental anguish and suffering, if any, directly caused by the publication of the statements and imputations referred to; whether the defendant was actuated by actual malice or intent to injure the plaintiffs in making the publication, and whether as a direct result thereof, the plaintiffs were exposed to hatred, contempt, ridicule, or public disgrace; and you may award each of them damages in such sum, not exceeding the amount asked for, as in your judgment will fairly compensate each of them for any such injury or damage to his or their name and reputation. If you find that there has been no such substantial injury or damage, then the damages awarded should be nominal only. The term "nominal damages" means damages in a small or nominal amount only, for the purpose of vindication, where a legal right has been shown to have been violated but no substantial damage has been proven to have been sustained by the plaintiffs.

As to exemplary or punitive damages, you are instructed that if you find from a preponderance of the evidence that the articles and editorial were published recklessly, wantonly, out of spite or ill will, or with utter disregard for the rights of the plaintiffs, you may also award each of them such further sum, not exceeding the amount asked for,

by way of exemplary or punitive damages as in your judgment you believe should be fairly assessed against the defendant. Exemplary or punitive damages may be allowed even though no compensatory damages are allowed. However, you are not obliged to allow the plaintiffs any sum by way of exemplary or punitive damages, which is a matter committed to your discretion by law; and if you find that the defendant honestly believed in the truth of the matter published and published such in good faith, without actual malice, you may take such into consideration in determining whether the plaintiffs are entitled to exemplary or punitive damages and the amount thereof.

You are further instructed that both compensatory damages and punitive damages must be considered by you separately as to each of the plaintiffs. In each case any award which you make for compensatory damages need have no relationship to any amount you may award for punitive damages.

In determining whether the defendant was actuated by actual malice you should consider the publications in their entirety, together with the facts and circumstances leading up to and attending the writing and publishing of the articles; the attitude of the defendant toward the plaintiffs; the motive, if any, shown for the publication; and whether the defendant was actuated by ill will, enmity, hatred or a desire to injure the plaintiffs in their fame or

reputation, or to degrade or disgrace them, and whether the defendant, its reporters, editors, or manager in good faith considered such publications to be fair comment and privileged.

No. 10.

You must consider the parties to this case as though they were all individual persons. A corporation is entitled to receive the same fair and unprejudiced treatment in a court of law which an individual would be entitled to receive under like circumstances.

A corporation is liable for the acts of its agents or employees authorized to act on its behalf, that is, a corporation can only act through its officers and agents, and is responsible for any wilful, malicious, wanton or reckless acts of its officers, agents, or employees done within the scope of their employment; hence the acts, conduct and motives of any such employee, acting within the scope of his employment, are to be considered as the acts, conduct and motives of the defendant corporation.

No. 11.

In a civil case, such as this is, the burden of proof rests upon the party holding the affirmative with respect to any issue, to prove such issue by a preponderance of the evidence. By a preponderance of the evidence is meant the greater weight of the credible evidence, that evidence which in your judgment is the better evidence and which has the

greater weight and value and the greater convincing power, or, in other words, such evidence, as when weighed with that opposed to it, has more convincing force and produces in the minds of the jurors conviction of the greater probability of truth, after they have considered all of the evidence in the case.

Any testimony offered by either party and rejected by the Court, and any testimony ordered stricken by the Court, should not be considered by the jury for any purpose.

No. 12.

Subject to the law as contained in these instructions, you are the exclusive judges of the credibility of the witnesses and of the effect and value of the evidence. Evidence includes not only all the facts testified to or established by the exhibits, but also all reasonable inferences which may be deduced therefrom. What facts have been proved and what inferences may be deduced therefrom is for you to determine. When the parties testify on their own behalf they are deemed witnesses, and their testimony is to be weighed and their credibility determined in the same manner as other witnesses.

You are, however, instructed that your power of judging the effect of evidence is not arbitrary but is to be exercised by you with legal discretion and in subordination to the rules of evidence. Evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it

is in the power of one side to produce and of the other to contradict and, therefore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party offering it, such evidence should be viewed with distrust.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number or against a presumption or other evidence satisfying your minds. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses, but that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence. The direct evidence of one witness whom you find to be entitled to full credit is sufficient for the proof of any fact in this case.

In determining the credit you will give to a witness and the weight and value you will attach to his testimony, you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or against any of the parties to the case; the probability or improbability of the statements of such witness; the opportunity he has to observe and be informed as to matters respecting which he gave evidence before you; and the inclination he evinced, in your

judgment, to speak the truth or otherwise as to matters within his knowledge.

A witness wilfully false in one part of his testimony may be distrusted in others.

No. 13.

You must not allow sympathy or prejudice to influence your verdict. Sympathy for the injuries of the plaintiffs, or for the owners of the defendant corporation, if any, should not influence you in determining whether or not the defendant is liable, or if liable, affect in any way the amount of your verdict. Your verdict should be entirely free from the effect of sympathy, compassion or prejudice.

No. 14.

At the close of the trial counsel have the right to argue the case to the jury. The arguments of counsel, based upon study and thought, may be, and usually are, distinctly helpful; however, it should be remembered that arguments of counsel are not evidence and cannot rightly be considered as such. It is your duty to give careful attention to the arguments of counsel, so far as the same are based upon the evidence which you have heard and the proper deductions therefrom, and the law as given to you by the Court in these instructions. But arguments of counsel, if they depart from the facts or from the law, should be disregarded.

No. 15.

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and, therefore, you should not single out one particular instruction and consider it by itself.

Your duty is to determine the facts of the case from the evidence submitted, and to apply to these facts the law as given to you by the Court in these instructions. The Court does not, either in these instructions or otherwise, wish to indicate how you shall find the facts or what your verdict shall be, or to influence you in the exercise of your right and duty to determine for yourselves the effect of evidence you have heard or the credibility of witnesses.

Finally, while you are not justified in departing from the evidence or the rules of law as stated by the Court, you may, in determining any question applying to the facts of this case, resort to the common sense and experience in the affairs of life which you ordinarily use in your daily transactions and which you would apply to any other subject coming under your consideration and demanding your judgment.

No. 16.

The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

While no juror should yield a sincere conviction, founded upon the law and the evidence of the case, merely to agree with other jurors, every juror, in

considering the case with fellow jurors, should lay aside all undue pride or vanity of personal judgment, and should consider differences of opinion, if any arise, in a spirt of fairness and candor, with an honest desire to get at the truth, and with the view of arriving at a just verdict because the law contemplates that the verdict shall be the product of the collective judgment of the entire jury.

Accordingly, no juror should hesitate to change the opinion he has entertained, or expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors.

No. 17.

Upon retiring to your jury room you will select one of your number foreman, who will speak for you and sign the verdict unanimously agreed upon.

You will take with you to the jury room these instructions, together with the exhibits, and six forms of verdict, two in each of the three consolidated cases, which must be considered separately. In each case, if you find in favor of the plaintiff you will have your foreman date and sign Verdict No. 1 after first inserting therein the amount of damages, both compensatory and punitive, which you find the plaintiff is entitled to recover. In each case, if you find in favor of the defendant you will have your foreman date and sign Verdict No. 2. Such verdicts, when completed and signed, should then be returned by you into Court as your verdict

in each case, together with the forms of verdict not used by you, the exhibits, and these instructions.

If you agree upon a verdict during Court hours, that is between 9 a.m. and 11:00 p.m., you should have your foreman date and sign it and then return it immediately into open Court in the presence of the entire jury, together with the exhibits and these instructions, and the unused forms of verdict. If, however, you do not agree upon a verdict during such hours, the verdict, after being similarly dated and signed, must be sealed in the envelopes accompanying these instructions. The foreman will then keep it in his possession unopened and the jury may separate and go to their homes, but all of you must be in the jury box when the Court next convenes at 10 a.m., Monday, when the verdict will be received from you in the usual way.

Given at Ketchikan, Alaska, this 19th day of November, 1955.

/s/ WALTER H. HODGE,
District Judge.

[Endorsed]: Filed November 21, 1955.

In the United States District Court for the District of Alaska, Division Number One, at Ketchikan

No. 6725-A

HENRY RODEN,

Plaintiff,

vs.

EMPIRE PRINTING COMPANY, a Corporation,

Defendant.

VERDICT No. 1

We, the jury, duly impanelled and sworn to try the above-entitled cause, find in favor of the plaintiff and against the defendant; and further find as follows:

1. That the plaintiff is entitled to recover from the defendant compensatory damages in the sum of $1.00.

2. That the plaintiff is entitled to recover from the defendant punitive damages in the sum of $5,000.00.

Dated at Ketchikan, Alaska, this 20th day of November, 1955.

/s/ TOM W. GAFFNEY, JR,
Foreman.

[Endorsed]: Filed November 21, 1955.

[Title of District Court and Cause.]

VERDICT No. 1
6726-A

We, the jury, duly impanelled and sworn to try the above-entitled cause, find in favor of the plaintiff and against the defendant; and further find as follows:

1. That the plaintiff is entitled to recover from the defendant compensatory damages in the sum of $1.00.

2. That the plaintiff is entitled to recover from the defendant punitive damages in the sum of $5,000.00.

Dated at Ketchikan, Alaska, this 20th day of November, 1955.

/s/ TOM W. GAFFNEY, JR.,
Foreman.

[Endorsed]: Filed November 21, 1955.

[Title of District Court and Cause.]

No. 6727-A

VERDICT No. 1

We, the jury, duly impanelled and sworn to try the above-entitled cause, find in favor of the plaintiff and against the defendant; and further find as follows:

1. That the plaintiff is entitled to recover from the defendant compensatory damages in the sum of $1.00.

2. That the plaintiff is entitled to recover from the defendant punitive damages in the sum of $5,000.00

Dated at Ketchikan, Alaska, this 20th day of November, 1955.

/s/ TOM W. GAFFNEY, JR.,
Foreman.

[Endorsed]: Filed November 21, 1955.

[Title of District Court and Cause.]

Nos. 6725-6726-6727A

OBJECTIONS OF DEFENDANT TO PROPOSED JUDGMENT FOR COSTS AND ATTORNEYS' FEES, AND REQUEST FOR REDUCTION OF JURY'S AWARD

Comes now the defendant by its attorneys H. L. Faulkner and Roger G. Connor, and objects to the entry of any judgment for costs and attorneys' fees to the plaintiffs, upon grounds as follows:

Costs and attorneys' fees are subject to the discretion of the Court, and the District Court for the First Judicial Division has heretofore never hesitated to exercise that discretion, and, taking into

consideration the circumstances of the case, has frequently denied both costs and attorneys' fees.

The verdict for compensatory damages was One Dollar to each of the plaintiffs, or a total of Three Dollars. Under the law this alone would not entitle the plaintiffs to costs. The verdict for punitive damages of Five Thousand Dollars to each plaintiff, or a total of Fifteen Thousand Dollars is out of proportion to the amount awarded as compensatory damages. Formerly it was the rule that punitive damages, awarded as punishment of defendant in libel cases could not exceed the amount awarded as compensatory damages. We concede that this has been changed and punitive damages may exceed the compensatory damages awarded, but still the matter of costs and attorneys' fees are left to the discretion of the Court, and we respectfully submit that this should be an additional reason for the exercise of that discretion notwithstanding the change in the rule above mentioned.

By awarding each plaintiff Five Thousand Dollars as punitive damages with only nominal damages to each, it would appear that the jury may well have made that award to the plaintiffs for the purpose of defraying their expenses of the trial of the action and preparing therefor.

The general rule, expressed in practically all libel suit decisions, is that in libel suits, while the jury may assess both general or compensatory damages and punitive damages, still the Court always exercises discretion as to the amount of the award.

Judge Yankwich states in his book "It's Libel Or Contempt If You Print It" at page 349:

> "Although the plaintiff may claim both compensatory and exemplary damages, if the jury should award exemplary damages without awarding compensatory damages, the verdict could not stand. Rightly. For a failure to award general damages indicates that the publication has not injured the plaintiff, because the truth has been established. Exemplary damages merely enhance the tort. (Emphasis supplied.)

The verdict of the jury in this case indicates that the plaintiffs suffered no actual damage by the publication complained of, for they were awarded only nominal damages. To assess $15,000.00 punitive damages on the $3.00 nominal damages, and costs and attorneys' fees in addition to that, would seem to be grossly excessive.

Defendant objects to the entry of a judgment for punitive damages in any sum not commensurate with the amounts of the verdicts for general or compensatory damages.

The whole matter is within the jurisdiction of the Court; that is, whether the punitive damages awarded by the jury are excessive when taken into consideration with the verdict for general damages, and, whether, under all the circumstances of the case, any costs or attorneys' fees should be allowed.

Submitted without argument this 25th day of November, 1955.

/s/ H. L. FAULKNER,

/s/ ROGER G. CONNOR,

Attorneys for Defendant.

[Endorsed]: Filed November 27, 1955.

[Title of District Court and Cause.]

Nos. 6725-A, 6726-A, 6727-A

DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICTS, OR FOR A NEW TRIAL

This motion is filed pursuant to the provisions of Rules 50 and 59 of the Federal Rules of Civil Procedure. Defendant moves the Court to set aside the verdicts of the jury in these consolidated cases and in each case and to enter judgment herein for the defendant. This motion is based upon the grounds presented to the Court and urged by defendant in its motion for directed verdicts made and filed at the conclusion of the introduction of testimony in these cases.

If the Court should deny the relief sought hereinabove and should refuse to enter judgment for defendant notwithstanding the verdicts, then, in order to avoid a waiver of the right to request a new trial within the ten days prescribed by Rule 59(b), de-

fendant now moves the Court for a new trial upon the following grounds:

(a) The Court erred in holding that since Section 12-2-1, ACLA 1949, did not provide any criminal penalty for its violation and that therefore plaintiffs could not lawfully have been charged with any criminal acts for violation of that section, no testimony could be introduced to show that any loss of funds occurred through plaintiffs' violation of Section 12-2-1 which would result in a violation of Section 65-5-63, ACLA, 1949.

(b) The Court erred in rejecting the testimony of Steve Homer under defendant's offer of proof and which testimony was offered to show a loss of public funds resulting from violation by plaintiffs of Section 12-2-1, ACLA, 1949, and of other testimony of defendant tending to support the testimony of Steve Homer.

(c) The Court erred in holding that an agent's criminal acts cannot be imputed to the principal even where the agent is appointed to perform an illegal act. (In this case the plaintiffs admitted that they violated Section 12-2-1, ACLA, 1949, and defendant offered to show a loss of public funds resulting from this violation of the law and that loss of public funds was a violation of Section 65-5-63, ACLA, 1949.

(d) The Court erred in holding that the violation by plaintiffs of Section 12-2-1, ACLA, 1949, was not also a violation of Section 65-5-63, ACLA, 1949.

(e) The Court erred in instructing the jury that the articles published by defendant, which are the basis of this action, constituted libel per se.

(f) The Court erred in holding that the canceled checks issued on the special ferry fund were immaterial and that the loss was immaterial in these cases.

(g) The Court erred in holding that bank deposits and checking accounts do not constitute a loan, creating the relationship of debtor and creditor between the bank and the depositor.

(h) The Court erred in admitting in evidence, over the objection of defendant, a printed copy of a letter purporting to have been written by Fred McGinnis. (Plaintiff's Ex. No. 8.)

(i) The Court erred in giving Instruction No. 6 and particularly that portion of it which reads:

> "the defendant must show by a preponderance of the evidence that plaintiffs handled the money wrongfully and fraudulently and with a criminal intent to convert such to their own use."

(j) The Court erred in giving Instruction No. 7 wherein the Court instructed the jury to disregard all testimony of a shortage of money in the handling of the public funds involved in this case and which instruction is based on the fact that the defendant did not mention a shortage of funds in the publication of September 25, 1952, and that therefore the

loss of public funds was not an issue in the case and was not relevant to the truth or falsity of the publication and in this connection defendant proposed Instruction No. 22 to the effect that the truth, whenever discovered, is a complete defense in a libel action, and it was an error to deny that instruction. (No. 8.)

(k) The Court erred in giving to the jury the first paragraph of Instruction No. 4 beginning on line 2 and ending on line 16 of the first page of that instruction.

(l) The Court erred in giving that portion of Instruction No. 5 which reads as follows:

> "You are further instructed that aside from the statutes above noted defining the crime of embezzlement of public funds, there is no statute in Alaska making a violation of the law relating to the receipt and disbursement of public funds by Territorial officials a crime, or subject to criminal prosecution,"

because Section 65-5-63 does make such violation of the law a crime and subject to criminal prosecution and imprisonment and this involves the same statute as the one under which Oscar Olson was sentenced.

(m) The Court erred in giving the first paragraph of Instruction No. 8 for the reason that the rejection of the testimony offered to show loss of public funds made it impossible for defendant to es-

tablish in detail the truth of the charge and the close parallel of the case to that of Oscar Olson.

(n) The Court erred in giving the instruction to the jury contained in the second paragraph on page 2 of Instruction No. 8 which is on page 17 of the instructions as a whole. This is the instruction regarding retraction as there is no retraction involved in this case.

(o) The Court erred in refusing to give defendant's proposed Instructions No. 30, No. 4, No. 5, No. 6, No. 7, No. 8, the last paragraph of Instruction No. 9, and No. 10.

(p) The Court erred in refusing to give defendant's proposed Instruction No. 11 with the exception of that portion which the Court did give to the effect that what one may lawfully speak, he may lawfully write and publish.

(q) The Court erred in refusing to give defendant's proposed Instructions No. 13, No. 14, No. 16, No. 18, No. 20, No. 22, No. 23, No. 24, No. 26, No. 27, No. 28, and No. 29.

(r) The Court erred in refusing to submit to the jury the specific questions requested by defendant in order to constitute special verdicts. This objection is particularly pertinent because of the nature of the verdicts found in that each is a $1.00 general or compensatory damage to each plaintiff and $5,000.00 to each as punitive damages. The general damages were nothing more than what is known as

nominal damages and the jury should have been permitted to find specifically whether there was malice as defined in the case of Coleman v. McLennon, 98 Pac. 281. It is impossible to tell from the general verdicts submitted and returned whether the jury based its award of punitive damages on malice as defined by the Court and the law.

(s) If any judgment shall have been entered before a consideration of this motion upon the verdicts of the jury rendered and filed in open Court on November 21, 1955, the defendant moves the Court to open and set aside the judgment entered herein and to either enter judgment for the defendant or to grant the defendant a new trial upon the grounds herein set forth.

Dated at Juneau, Alaska, this 25th day of November, 1955.

/s/ H. L. FAULKNER,

/s/ ROGER G. CONNOR,
Attorneys for Defendant.

Affidavit of mail attached.

[Endorsed]: Filed November 28, 1955.

[Title of District Court and Cause.]

Nos. 6725-A, 6726-A, 6727-A

ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICTS, OR FOR A NEW TRIAL

The above-entitled consolidated cases having come on regularly for trial before the above-entitled Court and a jury on November 14th to November 19th, 1955, and the jury having rendered a verdict in each case in favor of the plaintiff and against the defendant awarding to the plaintiff the sum of $1.00 as compensatory damages and the sum of $5,000.00 as punitive damages; and the defendant having presented and filed herein its motion to set aside the verdicts of the jury and to enter judgment for the defendant in each case, or, if such relief be denied, to order a new trial, specifying 18 assignments of error; and such motion having been submitted without argument; and the Court having considered each of such assignments of error and the reply of the plaintiffs thereto, and being fully advised in the premises; it is therefore Ordered as follows:

Paragraphs (a) and (b) of the assignments of error are overruled for the reasons stated by the Court during the progress of the trial and for the further reason that no testimony was offered by the defendant to show any loss of funds occurring through plaintiffs' violation of Sec. 12-2-1 which

could result in a violation of Sec. 65-5-63, ACLA, 1949, but the only evidence offered along this line purported to show a shortage of funds occurring in the hands of Robert Coughlin, purser of the ferry "Chilkoot," alleged to have been discovered subsequent to the publication complained of, on which grounds the ruling of the Court was based.

Paragraph (c) is overruled for the reason stated by the Court during the progress of the trial and for the further reason that the Court did not hold that "an agent's criminal acts cannot be imputed to the principal even when the agent is appointed to perform an illegal act," but held instead that the plaintiffs as principals could not be held criminally liable for any shortage of funds occurring in the hands of the purser unless they be accessories thereto; and for the further reason that plaintiffs did not admit at the trial that they had violated Sec. 12-2-1, ACLA, 1949, but denied such violation and alleged that they had handled the moneys in the "Chilkoot" ferry fund in accordance with a previous opinion of the Attorney General of the Territory; and that the Court did not hold that any loss of public funds by embezzlement thereof was not a violation of Sec. 65-5-63.

Paragraphs (d) to (r) inclusive, are overruled for the reasons assigned by the Court during the progress of the trial and for the further reason the Court's Instruction No. 8 fully covered the issue of truth of the words complained of as a defense to an action of libel and that the instructions given to

the jury and the refusal of defendant's requested instructions in no wise made it impossible for defendant to establish the truth of the charge set forth in the publication.

Finding no merit in the errors complained of and finding that the defendant received a fair and impartial trial as to all pertinent issues raised by the pleadings in such case, the Motion for Judgment Notwithstanding Verdict and the Motion for New Trial are denied.

Judgment is entered accordingly and in accordance with the Opinion of the Court rendered December 2, 1955, upon previous objections of the defendant to the proposed judgment.

Dated and entered at Ketchikan, Alaska, this 7th day of December, 1955.

/s/ WALTER H. HODGE,
District Judge.

[Endorsed]: Filed December 7, 1955.

In the District Court for the District of Alaska
Division Number One, at Ketchikan

No. 6725-A, 6726-A, 6727-A
Consolidated cases for trial.

HENRY RODEN,

Plaintiff,

vs.

EMPIRE PRINTING COMPANY, a Corporation,

Defendant.

ERNEST GRUENING,

Plaintiff,

vs.

EMPIRE PRINTING COMPANY, a Corporation,

Defendant.

FRANK A. METCALF,

Plaintiff,

vs.

EMPIRE PRINTING COMPANY, a Corporation,

Defendant.

JUDGMENT

The above consolidated cases came on for trial commencing November 14, 1955, before the Honorable Walter H. Hodge, District Judge, sitting at Ketchikan, Alaska, and trial ending on November 19, 1955, the plaintiffs being present in person and represented by Wendell P. Kay and Buell A. Nes-

bett, their attorneys, and the defendant being repre-represented by Wendell P. Kay and Buell A. Nesby H. L. Faulkner, its attorney; a jury of twelve (12) persons was regularly impaneled and sworn to try the causes and oral testimony and documentary proof having been introduced and admitted on behalf of both parties, whereupon the Court instructed the jury on the law in the matters and counsel for both sides having argued the matter to the jury the jury thereupon retired to consider their verdict. Thereafter and at ten o'clock a.m. on the 21st day of November, 1955, the jury returned into court with verdicts in each case which were unsealed in open court and in the presence of the jury and found to be verdicts in favor of the plaintiffs in each of the cases reading as follows:

* * *

[The Verdicts read herewith are set out in full, pages 118 to 120 of this printed record.]

Wherefore by virtue of the law and by reason of the premises aforesaid it is hereby

Ordered, Adjudged and Decreed that judgment be and is hereby given in favor of each of the plaintiffs above named in the sum of Five Thousand One Dollars ($5,001.00) and that plaintiffs shall have and recover from the defendant plaintiffs' costs and disbursements in this action incurred to be taxed by the Clerk of the Court in the manner provided by law and attorneys fees in the sum of $1,000.00.

Dated at Ketchikan, Alaska, this 7th day of December, 1955.

/s/ WALTER H. HODGE,
District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 7, 1955.

[Title of District Court and Cause.]

No. 6725-A, 6726-A, 6727-A

NOTICE OF APPEAL

Notice is Given that the Empire Printing Company, defendant above named, appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 7th day of December, 1955, and from the whole thereof.

Dated at Juneau, Alaska, this 8th day of December, 1955.

/s/ H. L. FAULKNER,

/s/ ROGER G. CONNOR,
Attorneys for Defendant.

Supersedeas and cost bond fixed at $25,000.00. December 9, 1955.

/s/ WALTER H. HODGE,
Judge.

[Endorsed]: Filed December 9, 1955.

[Title of District Court and Cause.]

No. 6725-A, 6726-A, 6727-A
Consolidated Cases

SUPERSEDEAS BOND AND COST BOND ON APPEAL

Whereas, the above-named appellant, Empire Printing Company, a Corporation, has appealed, or is about to appeal, to the United States Court of Appeals for the Ninth Circuit from that certain judgment entered, or to be entered hereafter, in the above-entitled causes, which were consolidated, on the 28th day of September, 1954, and from the whole thereof, and from the court's order denying appellant's motion for judgment notwithstanding the verdicts, or for a new trial, and which order overruling appellant's motion is dated before the entry of the judgment, and which judgment hereinabove mentioned is in favor of appellees and against the appellant; and,

Whereas, appellant is desirous of staying the execution of the judgment aforesaid pending the appeal and final determination thereof, and the appellant has agreed that the penal amount of the supersedeas and cost bond shall be $25,000.00,

Now, Therefore, in consideration of the premises and of the appeal, we, the undersigned, Empire Printing Company, a corporation, as principal, and Helen T. Monsen, of Juneau, Alaska, and William Prescott Allen, of Juneau, Alaska, as sureties, do

hereby jointly and severally undertake and promise and acknowledge ourselves, our succesors, executors and administrators, bound in the sum of $25,000.00, that appellant Empire Printing Company, a corporation, will satisfy the judgment in full, together with all costs, interests and damages for delay and costs of appeal, if for any reason the appeal is dismissed, or if the judgment is affirmed, and will satisfy in full such modification of the judgment and such costs, interests and damages as the appellate court may adjudge and award, including costs on appeal. This obligation is binding upon the successors, executors and administrators of the principal and sureties hereto and it shall be in favor of the several appellees, their heirs, executors, administrators and assigns.

In Witness Whereof, the Empire Printing Company, as principal, has caused this bond to be executed and the sureties have signed their names thereto, all on this 7th day of December, 1955.

[Seal] EMPIRE PRINTING COMPANY,

By /s/ HELEN T. MONSEN,
President.

Attest:

/s/ N. C. BANFIELD,
Secretary.
Principal.

/s/ HELEN T. MONSEN,

/s/ WILLIAM PRESCOTT ALLEN,
Sureties.

Executed in the Presence of:

/s/ H. L. FAULKNER.

/s/ LILA FOSTER.

United States of America,
Territory of Alaska—ss.

Acknowledged before me this 7th day of December, 1955, at Juneau, Alaska, by Helen T. Monsen and N. C. Banfield, as president and secretary, respectively, of the above-named Empire Printing Company, a corporation, as its free and voluntary act and deed.

Witness my hand and official seal the day and year hereinabove first written.

[Seal]: /s/ KATHRYN ADAMS.
Notary Public for Alaska.

My commission expires: May 15, 1956.

United States of America,
Territory of Alaska—ss.

This certifies that on this 7th day of December, 1955, at Juneau, Alaska, before me, the undersigned, a Notary Public for Alaska, duly commissioned and sworn, personally appeared the above named Helen T. Monsen and William Prescott Allen, the sureties who executed the foregoing bond and each

acknowledged to me that he and she are residents of the Territory of Alaska, owners of property therein, and that they are each worth more than the sum of $25,000.00 over and above all debts and liabilities, exclusive of property exempt from execution, and that neither of them is an attorney, counsellor at law, marshal, deputy marshal, clerk of any court, or other officer of any court, and that they are qualified in every respect to be sureties on the foregoing bond.

Witness my hand and seal on the day and year herein first above written.

[Seal] /s/ KATHRYN ADAMS,
Notary Public for Alaska.

My commission expires: May 15, 1956.

Approved and appeal allowed this 9th day of December, 1955.

/s/ WALTER H. HODGE,
Judge of the District Court, Territory of Alaska, Division Number One.

United States of America,
Territory of Alaska—ss.

We, the undersigned, Helen T. Monsen and William Prescott Allen, the sureties named in the foregoing bond, being first severally duly sworn, depose and say:

That we are both residents of the Territory of Alaska and property owners therein, and that we are each worth the sum of more than Twenty-Five Thousand ($25,000) Dollars over and above all our just debts and liabilities and exclusive of property exempt from execution, and that neither of us is a marshal, deputy marshal, clerk of any court, or any officer of any court, and that we are qualified in all respects to be sureties on the foregoing bond.

/s/ HELEN T. MONSEN,

/s/ WILLIAM PRESCOTT ALLEN.

Subscribed and sworn to before me this 7th day of December, 1955.

[Seal] /s/ KATHRYN ADAMS,
Notary Public for Alaska.

My commission expires: May 15, 1956.

[Endorsed]: Filed December 9, 1955.

[Title of District Court and Causes.]

Nos. 6725-A, 6726-A, 6727-A

ORDER EXTENDING TIME TO PREPARE AND FILE TRANSCRIPT AND TO PERFECT APPEAL

This Matter having come on before the court upon motion of the defendant for extension of time of an additional fifty (50) days within which

to file a transcript of record, defendant's designation of record on appeal, and defendant's statement of points to be relied upon on appeal, and it appearing to the court that the transcript of record cannot be completed by the court reporter and filed within the time specified in the rules,

Now, Therefore, it is hereby ordered that the defendant be and it is hereby granted until the 8th day of March, 1956, within which to file herein the transcript of record on appeal, the designation of record on appeal, and the statement of points to be relied upon by defendant on appeal to the United States Court of Appeals for the Ninth Circuit.

Done in Open Court this 20th day of December, 1955.

/s/ WALTER H. HODGE,
Judge.

Affidavit of Mail attached.

[Endorsed]: Filed December 20, 1955.

In the U. S. District Court for the District of Alaska, Division Number One, at Juneau

No. 6725-A

HENRY RODEN,

Plaintiff,

vs.

EMPIRE PRINTING COMPANY, a Corporation,

Defendant.

No. 6726-A

ERNEST GRUENING,

Plaintiff,

vs.

EMPIRE PRINTING COMPANY, a Corporation,

Defendant.

No. 6727-A

FRANK A. METCALF,

Plaintiff,

vs.

EMPIRE PRINTING COMPANY, a Corporation,

Defendant.

REPORTER'S TRANSCRIPT OF RECORD

Be It Remembered, that on the 14th day of November, 1955, Court having convened at 10:00 o'clock a.m., at Ketchikan, Alaska, the above-entitled causes, having previously been consolidated for trial, came on for trial before a jury; the Hon-

orable Walter H. Hodge, United States District Judge, presiding; the plaintiffs appearing by Wendell P. Kay and Buell A. Nesbett, of their attorneys; the defendant appearing by H. L. Faulkner, its attorney; respective counsel having announced they were ready for trial, empanelling of a jury was commenced.

Court recessed until 2:00 o'clock p.m., November 14, 1955, reconvening as per recess, with all parties present as heretofore, and empanelling of a jury was completed and the jury was sworn to try the causes; whereupon, the jury was duly admonished by the Court; respective counsel stipulated that, should it become necessary to excuse any member of the jury during the trial of the causes, they would proceed with less than twelve jurors;

Court adjourned until 10:00 o'clock a.m., November 15, 1955, reconvening as per adjournment, with all parties present as heretofore and the jury all present in the box; opening statements were made by respective counsel; whereupon, the jury was excused, and Court and counsel discussed some matters of law; whereupon, Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; upon plaintiffs' motion the Court excluded from the courtroom all witnesses, [2*] other than the parties and Mrs. Helen Monsen, president of the defendant company; whereupon the following proceedings were had:

The Court: You may proceed.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

PLAINTIFFS' CASE

ERNEST GRUENING

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Kay:

Q. Will you state your name, please?

A. Ernest Gruening.

Q. Will you state where your residence is, sir?

A. My residence is twenty-four miles north of Juneau at Eagle River Landing.

Q. And what is your present occupation, business or occupation, sir?

A. I am a writer and lecturer.

Q. Governor Gruening, you are a former Governor of the Territory of Alaska, are you not, sir?

A. That is correct.

Q. And when were you first appointed as Governor of the Territory?

A. In December of 1939. I took office on December 6th.

Q. Because it is relevant in the case on trial, Governor, [3] I am going to ask you briefly to give the Court and jury a short biographical sketch of your background prior to your appointment as Governor of the Territory, if you will do that, sir.

A. How far back shall I go?

Q. Well, start with your first job or education, sir, and bring it down briefly.

A. After graduating from school and college and

(Testimony of Ernest Gruening.)

professional school, I decided to go into newspaper work, and I started in as a reporter on a Boston newspaper, and I served as a reporter on that and other papers and gradually went through the other stages of newspaper work, copy desk editing, rewriting, and then became city editor and managing editor of a Boston paper, and in the subsequent years my vocation was that of a newspaperman, and I was the editor of various newspapers—the Boston Traveler, the Boston Journal, the New York Post, the New York Tribune—and the New York Nation, a weekly magazine. And in the course of my journalism I became very much interested in our relations with Latin America and wrote a good deal on the subject, got a leave of absence to go to Mexico to write some articles for Collier's Magazine and other magazines, and, when I came back, decided to write a book on Mexico, which was published in 1928, and, largely as a result of that and my interest in Latin [4] America, I was appointed the adviser to the United States Delegation at the Seventh Inter-American Conference, usually known as the Pan-American Conference, which met in 1933, and where we established what has become since known as the Good Neighbor Policy, which I had advocated. And, I think, because my services were deemed satisfactory, I was then appointed to a new position which had been created, that of Director of the Division of Territories and Island Possessions in the Department of the Interior, which had supervision over the Federal relations of our terri-

(Testimony of Ernest Gruening.)

tories and island possessions—Alaska, Hawaii, Puerto Rico, the Virgin Islands, and later, until they were given their independence, the Philippines, and several lesser islands, including the United States Antarctic Service, and I served there for five years when the governorship of Alaska became vacant, and during those five years as Director of Territories, I paid two visits to Alaska and had become somewhat familiar with its problems. At that time President Roosevelt asked me to serve as Governor, and that is how I came to be appointed.

Q. Who was your predecessor, sir, as Governor of Alaska? A. John Weir Troy.

Q. Now, Governor, after your appointment by President Roosevelt were you confirmed by the United States Senate? [5] A. Yes, I was.

Q. Was that confirmation unanimous?

A. I was confirmed three times, at the end of each four-year term; the terms are four years each; and I was confirmed each time by unanimous vote of the United States Senate.

Q. Your second appointment came in what year, sir?

A. The second appointment came in 1944.

Q. And your third appointment?

A. In 1948. Confirmation came the next year.

Q. And you served until what time?

A. Until April 10, 1953.

Q. Now, in your capacity as Governor of Alaska during the years 1950, '51 or '52, let's say, were

(Testimony of Ernest Gruening.)

you a member of the Territorial Board of Road Commissioners, of the Board of Road Commissioners for the Territory, sir?

A. I was required by Territorial law to be a member, chairman, of that and a number of other boards. That was only one of some dozen boards which the Territorial law required me to serve on.

Q. Were you a member of the Board of Road Commissioners then during the year 1951 and the year 1952, sir? A. I was.

Q. During the year 1951 did the Board of Road Commissioners engage in a transaction with regard to the purchase of the Ferry Chilkoot? [6]

A. It did.

Q. And will you state briefly what that transaction was, sir, to the best of your recollection?

A. There was, of course, a missing road link between Southeastern Alaska and the Westward part of Alaska, and it was considered desirable to establish that link so that people coming southward from the Interior of Alaska, or having gone up over the highway, and wishing to go to Southeastern Alaska, or vice versa, only to go up from Southeastern to the Interior, would have a service that would take their cars and enable them to accompany their cars, which they could do in no other way except through a ferry service.

Q. Well, the Board of Road Commissioners then did purchase, repair and place in operation a motor vessel known as the Chilkoot; is that correct?

A. That is correct.

(Testimony of Ernest Gruening.)

Q. And that vessel served between what points?

A. Principally between Juneau and Haines with side trips to Skagway, which was also deprived of practically all American service at that time.

Q. Now, in the spring of the year 1952, Governor, to the best of your recollection, did the Territorial Board of Road Commissioners face somewhat of a problem in connection with the operation of the Ferry Chilkoot? [7] A. Yes, they did.

Q. And would you state very briefly what that problem was?

A. Well, the problem was that no particular appropriation had been made for the ferry as such, and the funds to operate the ferry were the road funds, the funds derived from the revenues of the gas tax, which, I think, at that time was two cents a gallon, and this fund was, of course, used for road construction and road maintenance, and the Board of Road Commissioners, of course, considered that this ferry was a part of the highway system and that it linked two unconnected parts, and so they determined that, as these funds being used for the ferry would deprive certain other sections of the use of road monies for construction, that they would use the revenues as they came in for the support of the ferry. That was one problem.

Another problem was the fact that the crews, naturally, insisted on being paid whenever they completed their tour of duty. The ferry, as I recall it, would go twice a week and would be laid up for

(Testimony of Ernest Gruening.)

a day or two at each end, and, when the crews came back, they wanted to be paid, and in order to pay them promptly it was necessary to have a fund of this kind, otherwise they would have to go through the long delay of having vouchers being processed through the red tape of our government procedure, [8] and so that was considered a problem.

Q. Now, was that problem—first, let me ask, Governor, who were the other members of the Board of Road Commissioners besides yourself?

A. Henry Roden, then Treasurer of the Territory and former Attorney General of the Territory, and Frank Metcalf, the Territorial Highway Engineer; both of them elected officials.

Q. Now, did the Board of Road Commissioners face these problems concerning the operation of the Chilkoot Ferry in a meeting in the early part of June, 1952, to the best of your recollection?

A. Yes, they did.

Q. And that meeting was on or about June 5, 1952, was it not, sir?

A. To the best of my recollection.

Q. What was the result of that meeting with regard to this operation of the Ferry Chilkoot, sir, if any?

A. To the best of my recollection that meeting determined after consultation with the Attorney General that the receipts from the ferry should be deposited in a bank in a fund.

Q. And what use should be made of it?

A. And disbursed for the operating expenses of

(Testimony of Ernest Gruening.)

the ferry, the day by day wage payments and so forth. [9]

Q. Now, Governor, was any question, to the best of your recollection, whatever raised by anyone as to the legality of this particular course of operation, method of operation? A. None.

Q. Were all members of the Board present, sir?

A. They were.

Q. And do you recall what the vote, if any, or the measure of approval, which this plan received, was?

A. Well, there was no difference of opinion between any of the Board members or the Attorney General.

Q. Now, so far as you know, did the—was that plan or method of operation placed into effect thereafter by the Board of Road Commissioners?

A. It was.

Q. Did you—I take it that, being in the position of a member of a number of boards, that you perhaps were not as fully familiar with the day to day operations of the Board of Road Commissioners as perhaps the Highway Engineer or other members might be; is that correct?

A. Well, that is correct. I mean, the Highway Engineer was somewhat closer to the problem than I would be as a Board member, and the Treasurer also.

Q. In any event, sir, do you recall any mention or any discussion or any comment or problem arising in connection [10] with this method of handling

(Testimony of Ernest Gruening.)

the Chilkoot Ferry, from that time down until about the 25th of September, 1952?

A. Well, after the plan was put into effect it appeared to be operating smoothly, and I heard no comment of any kind until the publication.

Q. Was there anything secret or any attempted concealment by you or any of the members of the Board of this plan which had been placed in operation? A. Of course not.

Q. Now, are you familiar, Governor, with a newspaper known as the Alaska Daily Empire, published by the Empire Publishing Company in Juneau, Alaska? A. Yes, I am.

Q. Did you have occasion to see the edition of the Daily Alaska Empire for the day of September 25, 1952? A. Yes, I did.

Q. I will hand you an item and ask you what it is, sir. Is it a copy of the front page of the Daily Alaska Empire for that date?

A. That is the front page of the Empire of that date.

Q. And is it a line-run copy of the paper, so to speak, of the paper purchased by you at or about the time? A. It is the same.

Q. You have seen other copies of the issue of that day, have you not? [11] A. Oh, yes.

Q. Is it identical with the general run of the papers of that day? A. It is.

Mr. Kay: I will ask that this be offered in evidence if there is no objection. (Handing proposed exhibit to defendant's counsel.)

(Testimony of Ernest Gruening.)

I was going to offer the front page, but Mr. Faulkner pointed out that there is a brief continuation of one of the articles, which is involved in the defense although not in the plaintiffs' case, on Page 5, so I am going to offer the complete edition rather than the front page only.

Q. (By Mr. Kay): Does this appear to be a true and complete copy to the best of your knowledge of the edition of the Empire for the 25th of September, 1952? A. Yes, it is.

Mr. Kay: I will offer it in evidence.

The Court: I presume there is no objection?

Mr. Faulkner: No; no objection.

The Court: It may be admitted.

The Clerk: This will be Plaintiffs' Exhibit Number 1.

(Whereupon, the jury was duly admonished, and the trial was recessed until 2:00 o'clock p.m., November 15, 1955, and resumed as per recess, with all parties present as [12] heretofore and the jury all present in the box; the witness Ernest Gruening resumed the witness stand, and the Direct Examination by Mr. Kay was continued as follows:)

Mr. Kay: Your Honor, at this time, in view of the rule that the exhibits should be read to the jury while the witness is on the witness stand, I am going to read the exhibit that we have offered in evidence, such portions of it as I desire to, and of course, Mr.

(Testimony of Ernest Gruening.)

Faulkner has the right to read any portions that I do not read.

The Exhibit No. 1 is the front page of the Alaska Daily Empire for September 25, 1952. As you can see, the headline is "Bare 'Special' Ferry Fund." Then across the left-hand margin runs a headline "Reeve Raps Graft, Corruption," and under neath that is a photostatic copy of a check signed "Chilkoot Ferry, Robert E. Coughlin," drawn on B. M. Behrends Bank, Juneau, Alaska. That check reads as follows: "No. 49. Juneau, Alaska, 20 August, 1952. Pay to the order of Steve Larsson Homer. $398.04," and spelled out, "Three Hundred Ninety-eight and 04/100 Dollars. Chilkoot Ferry, Robert E. Coughlin."

Beneath that check appears the following in rather heavy small type: "Shown above is a photostatic copy of a check drawn on the special 'Chilkoot Ferry' account and signed by Robert E. Coughlin. The check is in payment of wages to Steve Larsson Homer, then an employee of the Territory [13] serving aboard the MV Chilkoot. This is but one of a number of checks so drawn since the special account was opened at the B. M. Behrends Bank. Auditor Neil Moore requested a statement of the account showing deposits and disbursements, but was told by bank officials that the bank would give him no detailed information concerning the account."

Then the subheading on the right-hand part of the paper covering three columns reads as follows: "Gruening, Metcalf, Roden Divert 'Chilkoot' Cash

(Testimony of Ernest Gruening.)

to Private Bank Account." Beneath that: "Auditor Neil Moore and Assistant Attorney General John Dimond Halt Payments from Fund. By Jack D. Daum." The article reads as follows: "To avoid paying territorial money into the general fund as provided by law, Governor Gruening, Treasurer Roden and Highway Engineer Frank Metcalf have set up a 'special fund' at a Juneau bank, territorial auditor Neil Moore disclosed today."

Subheadline: "Illegal Payments." "The 'special fund,' which dates back to early last year, is in the B. M. Behrends bank under the name 'Chilkoot Ferry— by Robert E. Coughlin.' Into it have gone the receipts from the operation of the ferry which was purchased by the Territory in May, 1951, and there have been thousands of dollars of illegal receipts and disbursements recorded in the fund to date, Moore charged.

"After learning of the unauthorized account [14] late last month, Auditor Moore and assistant attorney general John Dimond ordered the bank to stop payment on all checks drawn against the account.

"The case closely parallels that of Oscar Olson, former territorial treasurer who is now serving a prison term at McNeil's Island penitentiary for violating the law in the receipt and disbursement of public funds." Then it goes on.

I am stopping now at the end of the—one, two, three—fourth paragraph in order to avoid burdening the record here, and down to the continuation

(Testimony of Ernest Gruening.)

of the story on Page 2, and I will read to you the last two paragraphs of the article: "Since then there has been no further action in the case. Any investigation to determine the extent to which the law has been broken now rests presumably with the U. S. district attorney, P. J. Gilmore, Jr., who said last night he is the sole prosecuting officer in this division for territorial and federal criminal cases.

"The Empire learned of the unprecedented transaction when Homer told the story to a reporter." —"when Homer told the story to a reporter."

Now, then, also there is on the front page a bold-faced editorial, two-column editorial, running the length of the page, more or less on the left-hand center of the page, beneath the photostatic copy of the check, headed in black print, "Start Talking, Boys (An Editorial). Disclosed in [15] today's Empire is a story almost too fantastic for belief, but the facts have been personally verified by both the territorial auditor and assistant attorney general."

I am stopping reading and going on down here to the—one, two, three, four, five, six, seven, eight—ninth paragraph of the editorial which reads as follows: "If this method of by-passing the law is acceptable to the attorney general and the U. S. district attorney, why is it not possible for every department head who finds himself running over his appropriation to set up 'special funds' from the money his office takes in?"

And skipping then to the final paragraph of the

(Testimony of Ernest Gruening.)

editorial which reads as follows: "Oscar Olson sits today in his prison cell, dreaming of the days when he thought territorial laws were only for the underlings."

Of course, the entire editorial will be before you, ladies and gentlemen, the entire paper, and you can examine any other portions of it. I merely wanted to bring out those particular portions by reading them at this time. Mr. Faulkner can read the balance if he wants to, or it will be available to you in your deliberations to read the entire article as of course you will probably want to do.

Q. (By Mr. Kay): Governor Gruening, I will hand you Exhibit No. 1. Now, Governor, will you tell the Court and jury please in your own words what your reaction was when you [16] first saw the edition of the Alaska Daily Empire for Thursday, September 25, 1952?

A. I was terribly shocked. I was deeply disturbed. I felt as if a pile driver had suddenly hit me on the head.

Q. Governor, referring to the headline, the banner headline, which reads "Bare 'Special' Ferry Fund," can you state whether or not that headline is true or false? A. False.

Q. What is there about that headline which is false, sir?

A. Well the word "Bare," as if something secret and concealed had been exposed and brought to light; the quotation marks around the word "'Special,'" as if there were something very extraordi-

(Testimony of Ernest Gruening.)

nary and sinister about it; and the size of the type. I had never seen larger type than that used for any story in the Empire; the largest type they had, I suppose.

Q. How long have you lived in Juneau, Governor? A. Since 1939.

Q. You have read the Empire almost daily, have you not? A. Yes.

Q. Have you ever seen them use any larger type than that for even a declaration of war, Pearl Harbor, the end of the war in Europe, or any other time?

A. I don't recall that they ever used any larger type for any story, no matter what its importance, to the best of [17] my recollection.

Q. All right, sir. Now I refer you to the subheadline "Reeve Raps Graft, Corruption" and a photostatic copy of the check appearing immediately under it. Can you comment on the accuracy of that subheadline and its position in relationship to the check?

A. Well, anybody looking at this paper as a whole concluded, as I did when I first saw it, that the graft and corruption and the picture of the check were all part of the same story. Any time you reproduce a photostatic copy of a check, it is clearly intended to convey that this check has been unearthed and that it was kept a dark secret and that this is a proof of graft and corruption. That is what I got out of it.

(Testimony of Ernest Gruening.)

Q. Can you comment, sir, on the heading, the headline which appears over the right-hand three columns of the paper, subheadline, "Gruening, MetCalf, Roden Divert 'Chilkoot' Cash to Private Bank Account"? State whether that headline is false or an accurate——

A. It is false.

Mr. Faulkner: If the Court please, just a moment. I don't like to interrupt and I don't mind too much having Governor Gruening state his impressions, but I think that these questions are not proper. In considering the matter of what is libel in a publication of a newspaper the whole [18] article, headlines and all, must be read together. And, if the Court has any doubt about this, I would like to——

The Court: I have no doubt about that, counsel. The jury will be instructed that the whole article must be read together. However, the witness can state whether certain portions of the article are true or false——

Mr. Kay: That was all that I was attempting to do, your Honor.

The Court: ——and may explain wherein it is true or false.

Mr. Faulkner: Yes; but you can't say whether a headline is true or false unless it is in relation to the article itself, because the Court of Appeals has held in——

The Court: The witness is referring to the article itself. I think he may explain.

(Testimony of Ernest Gruening.)

A. Well, that is false. Gruening, Metcalf and Roden did not divert anything to a private bank account. It was a public account held for the purpose of paying public expenses on a publicly run enterprise. There was nothing private about it. And the word "Divert" clearly implies that there was something crooked and underhanded about it.

Q. (By Mr. Kay): In other words, "divert" ordinarily implies a turning into channels, I believe the dictionary definition would be, other than those that are proper and legitimate. Am I correct? [19]

A. You are absolutely right. That is what I gathered.

Q. Now, Governor, I will refer you down to the body of the article and call your attention particularly to the third paragraph—no—the fourth paragraph of the article itself by Jack D. Daum, the seventh column of the front page: "The case closely parallels that of Oscar Olson, former territorial treasurer who is now serving a prison term at McNeil's Island penitentiary for violating the law in the receipt and disbursement of public funds." And I ask you whether that statement is true or false, sir?

A. Oscar Olson was sent to jail because he was a thief. He stole public money. And this story says that our case closely parallels it. It is just as false as anything can be.

Q. Is that parallel—I have noted that that parallel is again repeated in the editorial "Start Talk-

(Testimony of Ernest Gruening.)

ing, Boys"; is that correct, the last paragraph of that editorial?

A. Yes. Well, that also isn't correct.

Q. Is that a true or false implication contained in that last paragraph of the editorial about Oscar Olson?

A. I think the implication is false in two ways. In the first place it again draws the parallel with Oscar Olson sitting in his cell; but it goes on to say, "dreaming of the days when he thought territorial laws were only for [20] the underlings." That isn't what Oscar Olson went to jail for, for thinking that laws were made only for the underlings. He went to jail because he embezzled money, thousands of dollars, and stuck them in his own pocket and spent them. That is why he went to jail.

Q. Now, Governor, we have gone over these items in stories and the editorial to which I have called attention. I call your attention to the next to the last paragraph—will you turn to the second page of the issue of September 25th, Governor—the next to the last paragraph of the article over here in the sixth column—eighth column, pardon me. That paragraph reads: "Since then there has been no further action in the case. Any investigation to determine the extent to which the law has been broken now rests presumably with the U. S. district attorney, P. J. Gilmore, Jr., who said last night he is the sole prosecuting officer in this division for territorial and federal criminal cases." Can you state whether

(Testimony of Ernest Gruening.)

or not that paragraph conveys a true and accurate——

A. Well, it is perfectly clear that that was a paragraph planted to convey the intent of criminality. Mr. Gilmore hadn't said anything about the case, but the writer said, "Any investigation to determine the extent to which the law has been broken now rests presumably with the U. S. district attorney, P. J. Gilmore, Jr.," and the writer [21] of course knew that the U. S. District Attorney was the man who would prosecute criminal cases, but Mr. Gilmore didn't say that. He merely is quoted as saying that he would be the only prosecuting officer if it were a criminal case.

Q. For all Territorial and Federal criminal cases.

A. This is dragged into give the impression very definitely that a crime had been committed and that we had committed the crime.

Q. And now, Governor Gruening, as a result of this publication of this article, articles, and editorial and the layout of the Empire on this particular occasion of September 25, 1952, you have already said, I believe, that you suffered, or that you were shocked and highly disturbed by this. What, if any, effect did that have on your mental attitude, Governor, your mental feelings, let us say?

A. Well, I felt in a daze, as if I had been charged, and I had been charged before the whole world in the most extensive manner, the whole front page that was visible, of being a criminal and por-

(Testimony of Ernest Gruening.)

trayed to my fellow citizens not only in Alaska but "Outside" as having been guilty of a crime.

Q. Governor, do you feel that you suffered damage to your reputation by reason of the publication of the Juneau, [22] Alaska, Daily Empire of September 25, 1952?

A. No question about it. Many people believe everything they read in a newspaper, and, certainly, when it is presented in this kind of a form, few people could overlook it.

Q. How long had you been in public life, sir, prior to this publication of September 25, 1952?

A. I had been continuously in public life for eighteen years.

Q. Had you—I presume during that period you had had your share of criticism of one kind or another? A. Oh, yes, certainly.

Q. Had you ever before, Governor, had an accusation comparable or in any way comparable to this leveled at your reputation? A. Never.

Q. Governor, do you feel that you suffered any damage to you in your capacity as a public official, as Governor of the Territory of Alaska, sir?

A. Well, the most important thing that a public official has is public confidence, the confidence of the public, the confidence of superiors, the confidence of his associates, here and in Washington, and that confidence certainly was shaken by an article of this kind by a paper presumably responsible, the leading paper in the capital, the only daily paper, the capital of the [23] Territory.

(Testimony of Ernest Gruening.)

Q. Now, at an earlier point in your examination, Governor Gruening, you referred to this as, I forget your words, the last straw or the climax of a campaign which had been, you felt had been, waged against you by the Empire over a period of years. Am I correct in that? A. That is correct.

Q. I wonder if you could give us a few examples of this campaign from your best recollection.

A. Well, of course this campaign extended over a period of ten years, more or less, and the Empire missed practically no opportunity to denounce me, criticize me, to find fault with everything that I did, almost everything, certainly, and to imply that my motives were base, that I was intellectually dishonest, that I wasn't sincere in what I was trying to do. This was universally known in Juneau, that that was the attitude of the Empire. And, even at times when what I did was in agreement with policies of the Empire, they would find an opportunity to find fault. There was a period when for some reason of their own they actually left my name out of every news story for a considerable period, referring to me only as the Governor, whereas everyone else in the story would be mentioned by name. Now, I don't know just what the purpose of that was, but it certainly wasn't a friendly [24] purpose. It showed a certain very definite animosity without any question, and that continued for some time.

Q. I believe that at my request, Governor, you culled out a few newspapers, which you were able

(Testimony of Ernest Gruening.)

to find and which were available to you, to demonstrate this testimony that there was a considerable period of time when the Empire instead of referring to you by your given name referred to you only as the Governor of Alaska?

A. That is correct. It lasted some time.

Q. I will hand you a group of newspapers and ask if you will examine them and either mark them, or, if they are already marked, you need not do so, but, if they are not marked with references, will you mark them, sir? Just mark them, and then I will ask about them.

A. Well, here is a story.

Q. You need not discuss the story, sir. If you will just mark them, then I will bring them to the jury's attention.

A. That one is marked.

Q. While you are examining those others, perhaps I——

Mr. Kay: I am sorry. I should offer these to you (handing proposed exhibits to defendant's counsel).

The Court: For identification refer to the dates, counsel.

Mr. Kay: I will, and I am going to also offer them [25] all as one exhibit.

The Court: I mean, as the witness identifies them.

A. Now, I want to say, add, that these deletions of my name did not merely occur in stories written in the Empire office. They went so far as to include

(Testimony of Ernest Gruening.)

Associated Press stories from Washington, stories that are supposed to be run pretty much as they are sent, stories that have back of them the reliability and responsibility and reputation of the Associated Press, and even in those stories someone in the Empire office would cut out my name wherever it appeared. Here is an example of that.

Q. This is in the edition of Thursday, January 16th.

A. Here is another example of an Associated Press story from Washington on an important matter in which my name was taken out wherever it appeared but every other official's name was left in it.

Q. This is in the edition of November 6, 1946. The first one was January 17th.

A. Here is another story of that same kind.

Q. This is from the November 6, 1946.

A. Here is still another story referring to Alaska's Governor, who apparently had no name.

Q. This is from the November 5, 1946.

A. Here is still another. These are only a few examples taken at random. [267]

Q. Do you recall how long this treatment went on, Governor?

A. Oh, it lasted for months anyhow.

Q. This is from the February 20, 1947, an article on——

The Court: 1947?

Mr. Kay: February 20, 1947; yes, sir.

Q. (By Mr. Kay): I take it that you are not

(Testimony of Ernest Gruening.)

offering this as any objection to their failure to print your name but merely as an example of their journalistic practice?

A. Well, it was an example of their attitude to leave my name out wherever possible, often to omit an important participation that I might have had in public affairs so as to deny the public the evidence of that participation and to emphasize unfavorable things.

I remember one case in particular, which is not exactly the same but it is parallel in motive. There was an important hearing of a Congressional committee, the Committee on Public Lands, which came to Alaska, I believe, in the late winter of 1952, if my recollection is not wrong as to the date. This committee was trying to study what was wrong with our land laws and to undertake a drastic revision. It was an important committee. It held only two hearings in Alaska, one in Juneau and one in Anchorage. And I was the first and principal witness and I appeared and testified at some length, possibly three-quarters of an hour, and I was followed by [27] a distinguished citizen of Juneau, who happens to be Mr. Bert Faulkner, counsel for the opposing side, and Mr. Faulkner began his testimony by saying that I had covered the subject so well and so completely that there was really little or nothing for him left to say, and on various occasions during his testimony he repeated that; he said it several times; but, finally, getting warmed up, he did speak at some length. That hearing was covered by the

(Testimony of Ernest Gruening.)

Empire by Mr. Jack Daum. My appearance was never mentioned. Mr. Faulkner's was mentioned at considerable length, although he came along and said he agreed with and approved everything I had said.

Q. In other words, then, as far as the public went, if they read the Empire, you never were at the hearing?

A. I might just as well not have been there, although I was the principal witness.

Mr. Kay: Now, I don't want to take the time of the Court or of the jury to read all of these examples. I am going to offer them. I have already shown them to Mr. Faulkner. They are offered only for this one purpose, of showing the omission of the name Gruening or Ernest Gruening entirely from the columns of the Alaska Daily Empire and reference to him only as the Governor, Alaska's Governor or Governor of Alaska. I am offering them only for that purpose.

The Court: Any objection, considering the purpose [28] of the offer?

Mr. Faulkner: No objection.

The Court: It may be admitted for that purpose.

Mr. Kay: Six copies of the Alaska Daily Empire, one exhibit.

The Court: Could you attach them together as an exhibit?

The Clerk: Six copies of the Empire are marked Plaintiffs' Exhibit No. 2.

(Testimony of Ernest Gruening.)

Mr. Kay: As I said, I am not going to read these. You will have an opportunity to read them. They will be among the exhibits that you will be allowed to take with you, and they are offered for that purpose, to show the Empire, for whatever reason you may conclude, adopted this rather peculiar practice.

Q. (By Mr. Kay): Now, along the same lines, Governor, I believe you testified at one point there that even in Associated Press stories from outside Alaska that the Empire deleted your name; is that correct? A. That is correct; yes.

Q. I will show you a photostatic copy of a portion of the front page of the Alaska Daily Empire for June 26, 1946, and ask you if the right-hand column contains an Associated Press story?

A. That is true; yes. [29]

Q. Did that same story appear elsewhere in the press of the Territory of Alaska?

A. Yes. It appeared throughout the Territory.

Q. Did it appear particularly in the Ketchikan Chronicle for June 26, 1946? A. It did.

Q. Is this a carbon copy, a true, correct carbon copy, of that same release as appeared in the Ketchikan Chronicle for that date?

A. Yes; the date being June 26, 1946.

Mr. Kay: I will offer these in evidence as Plaintiffs' Exhibit 3 (handing to defendant's counsel). There being no objection, your Honor, I will offer it as Plaintiff's Exhibit 3.

(Testimony of Ernest Gruening.)

The Court: It may be admitted.

Clerk of Court: So marked as Plaintiff's Exhibit 3.

Mr. Kay: I think I will take the time—it is very short—to read this to the jury because I find it rather amusing myself. The Associated Press story that appeared in the Ketchikan Chronicle reads as follows:

"Washington (AP)—Secretary of the Interior J. A. Krug said yesterday he plans to visit Alaska, probably in August, but declined comment on criticism of Governor Gruening's trip here with a delegation seeking air service to the Territory. [30]

"Krug was asked at a press conference for comment on the statement by Senator Mitchell (D-Wash.) that he would ask for an investigation of Gruening's participation in the flight from Anchorage here by an Alaskan group seeking a direct mid-west Alaska air route.

"Members of the group said they opposed a direct line from Seattle to the orient. Gruening said yesterday the Alaskans would not oppose the Seattle line if they could have direct mid-west connections.

"The Anchorage Chamber of Commerce organized the trip. Gruening said each person in the party paid his own way."

Here is the story that appeared in the Daily Alaska Empire:

"Washington, June 26.—Secretary of the Interior J. A. Krug says he plans to visit Alaska, probably in August, but declined comment on criti-

(Testimony of Ernest Gruening.)

cism of the Alaskan Governor's trip here with a delegation seeking air service to the Territory.

"Krug was asked at a press conference for comment on the statement by Senator Mitchell (D-Wash.) that he would ask for an investigation of the Alaska Governor's participation in the flight from Anchorage here by an Alaskan group seeking a direct mid-west Alaska air route.

"Members of the group said they opposed a direct [31] line from Seattle to the Orient. The Alaska Governor said yesterday the Alaskans would not oppose the Seattle line if they could have direct mid-west connections.

"The Anchorage Chamber of Commerce organized the trip. Alaska's Governor said each person in the party paid his own way."

Q. (By Mr. Kay): Who was Alaska's Governor at that time, Governor Gruening?

A. Well, I think you know the answer.

Q. Now, do you have—I will call your attention to perhaps another example, Governor Gruening, with reference to the status of Indian reservations in the Territory of Alaska. Could you tell us about that, sir?

A. Well, that was an example of where my views, publicly expressed, happened to coincide with those of the Empire, but not only did the Empire give me no credit for that but they attacked me editorially for taking a position which they had taken themselves, and the circumstances were these.

Secretary Ickes and some of his subordinates

(Testimony of Ernest Gruening.)

conceived the idea of extending Indian reservations all over Southeastern Alaska and carving out large sections of land and withdrawing them from use and making them Indian reservations, and, as far as I could detect, very few people in Alaska shared that view, either Indians or [32] whites, but they insisted on doing it, and these claims were pressed by certain Indian lawyers, and the Empire had an editorial criticizing these Indian lawyers for their tactics.

In 1952 the United States Senate had an investigation of this matter, and the investigating committee summoned me to appear before it, and I testified as to my views on this matter, and then the editorial in the Empire criticized me for this testimony that I had given and for partaking in this, although, in the first place, I was called to testify, and, in the second place, the views I had expressed were exactly the same as the views the Empire had expressed.

Q. Now, I will hand you—let's see if you can put this in chronological order for me. This will be offered as one exhibit, incidentally, relating to this one point. There appear to be four items.

A. Well, here is first of all an editorial entitled "Indian Reservations," which gives the general attitude of the Empire that the setting aside of reservations and making Indians live on them was contrary to good policy and contrary to the wishes of the people of Alaska.

Q. Where is the date of that? Is that dated December 29, 1949; is it, sir?

(Testimony of Ernest Gruening.)

A. Yes. And here is another one—the date is not given—on [33] the same subject—I think the date could be identified—entitled "Another 'Grab,'" and even reprinting along the same lines an editorial from the Ketchikan Fishing News entitled "The 'Ickes' Blight."

And then here is a third editorial, from the Empire of December 5, 1947, entitled "They Asked for It," in which sharp criticism is voiced of Indian lawyers. Starting, the editorial says: "The Indians of Southeast Alaska and elsewhere, who have blindly followed the advice of their glib attorneys from back East" and so forth.

Then, shortly after I testified in Washington before a Congressional committee to which I was called, a Senatorial committee, came the editorial entitled "Indians vs. Bureaucrats," in which it says, "More recently, Governor Gruening joined the pack snapping at the attorney's heels." I don't know whether the Empire considers themselves part of the back or not, but they had taken advantage of the same position. And then it ended up by saying, after a number of uncomplimentary references, "Gruening makes great pretense of friendship for Alaska natives and clouds the air with promises of all the fine things he is going to do for them. One very fine thing he could do is to respect their status as citizens and put an end to his usual buttinski [34] tactics."

Mr. Kay: I will offer these groups relating to

(Testimony of Ernest Gruening.)

the matter of Indian attorneys and comment on them as one exhibit, if I may.

Mr. Faulkner: That will be 4?

Mr. Kay: That will be Exhibit No. 4, containing four items, four separate editorials in the Daily Alaska Empire.

The Court: It may be admitted.

Clerk of Court: That will be so marked—Exhibit 4.

Q. (By Mr. Kay): Now, calling your attention to perhaps one other item that you may wish to discuss briefly, was there, back in 1944 was there, an affidavit of some kind published relative to certain accusations against you, published in the Daily Alaska Empire for April 12, 1944? A. Yes.

Q. I will hand you these papers and ask you to identify them for me and place them in their proper order, if you will, and discuss the incident.

A. Well, a man, who had come to my office on several occasions because he had been squeezed out of a homestead when the outlines of Glacier Bay were enlarged and in want of help, came into my office and asked me a number of questions about the coming election, and the man had come up several times, and we had done everything we [35] could for him. Then there appeared in the Empire an affidavit with this note: "(Editor's Note: This morning we were approached by a Juneau man and fisherman with a story which was so shocking to us in its implications and content that we could hardly believe it. For this reason, we asked the person, who

(Testimony of Ernest Gruening.)

requested we withold his name at this time, to make a sworn statement, which he did. The statement was signed and duly notarized and sworn to. We will have editorial comment on it tomorrow."

It tells that I had called this man to my office and had tried to tell him how he should vote at the next election. The story was false from beginning to end. The man was on a boat. He had no telephone. I had no way of calling him or would never have called him. And he was a criminal. He was a man who had served three to fourteen years for forgery in the State Penitentiary at Boise, Idaho. He had served six months in the Federal Jail in Juneau for violation of the Bone Dry Law. He was planted on me for the deliberate purpose of securing this affidavit, which appeared the next day, without any attempt being given to me to check whether this story was true.

No responsible paper would print a thing of this kind without at least going to the other party and saying: "Did this happen? What is your side of the story?" [36] They printed this wholly false affidavit and, while I immediately wrote a communication to the Empire saying it was false and at the same time there was a communication from four of the United Trollers repudiating this man, The Empire proceeded to comment adversely editorially on the same day.

The result of this was that I was questioned sharply by the Secretary of the Interior as to whether I had been guilty of the practices which the

(Testimony of Ernest Gruening.)

Empire affidavit alleged I had. Of course I hadn't. I had a witness in my office—my secretary.

Q. This exhibit contains the so-called affidavit and the Editor's Note—"Fisherman Reveals How Federal Officials Try to Control Election"——

A. Yes, sir.

Q. ——the communication from you and the communication from the four fishermen that you mentioned with regard to the gentleman in question——

A. And the criminal record of the man.

Q. And you say that the Empire at about the same time commented favorably, or continued to comment? A. Yes, it did; on that same day.

Q. And then there is also here a letter from Secretary Ickes demanding an explanation.

A. Which is an evidence of how a publication of this kind [37] destroyed a confidence of your own superiors. Of course I was able to explain the story satisfactorily because I had witnesses.

Mr. Kay: This is a sworn affidavit (handing proposed exhibit to defendant's counsel). I offer this in evidence without objection. It is Plaintiffs' Exhibit —what—is it 5?

Clerk of Court: Plaintiffs' Exhibit No. 5.

The Court: It may be admitted.

Mr. Kay: Mr. Faulkner has kindly offered to stipulate with me that all these exhibits can be used in argument by either side without the necessity of reading them to the jury at this time.

The Court: Very well.

(Testimony of Ernest Gruening.)

Mr. Kay: It will save us the trouble of doing that.

Q. (By Mr. Kay): Now, Governor, I have here a group of editorials which I am going to offer to you and then offer as one exhibit: an editorial, Friday, May 25, 1951, entitled "Governors' Trip"; editorial, September 7, 1951, entitled "Trouble in Paradise"; September 13, 1951, entitled "Another Stab in the Back"; April 14, 1952, entitled "The J-J Clambake"; April 15, 1952, entitled "R. E. (Anything for a Laugh) Sheldon." May I ask, sir, if these are all editorials clipped from the Alaska Daily Empire of the issues, days, on which they are dated? [38] A. Yes, they are.

Q. And do they relate, all of them, to this campaign, concerning which you have testified, on the part of the Empire?

A. They do. They are evidences of continual malice and animosity and hatred.

Q. In your opinion?

A. In my opinion; yes.

Mr. Kay: I will offer these in evidence as one exhibit (handing proposed exhibit to defendant's counsel.) Without objection, I will offer them in evidence, sir.

The Court: They may be admitted. The editorials will be admitted as one exhibit.

The Clerk: They are marked Plaintiffs' Exhibit No. 6.

Mr. Kay: I am going to refer briefly to some portions of these editorials. For example, on Fri-

(Testimony of Ernest Gruening.)

day, May 25, 1951, this editorial entitled "Governors' Trip," the editorial is discussing the visit of Governor Earl Warren of California to the Territory of Alaska, discussing the visit of the Governor accompanied by Governor Gruening to Fairbanks. The editorial concludes: "The Governor of California then unknowingly stepped into the trap and in an anti-statehood Fairbanks where he was guest of its University he delivered a speech on statehood that was plainly from the notebook of the statehood [39] committee.

"What was to have been a delightful social affair turned out an embarrassing political rally for statehood and the Governor's fair-haired favorites.

"It was an imposition on the good nature of a greater leader when he was used for such a lowly and purely selfish purpose.

"The rest of Alaska must surely be bowing low in humble apology today for the untoward action of its governor."

In an editorial, Tuesday, April 15, 1952, entitled "R. E. (Anything for a Laugh) Sheldon," appears this paragraph, which is the fourth paragraph of the editorial: "If Sheldon gave this inconsistency any thought, which he apparently did not, he must have smiled, too. Because the very reason Sheldon is running for Auditor is to help Gruening keep his gang together in spite of decent Democrats."

In the editorial, entitled "The J-J Clambake," for April 14, 1952, the fifth paragraph on the right-hand column of the editorial reads as follows: "Al-

(Testimony of Ernest Gruening.)

though the meeting was held ostensibly to permit candidates for office to be heard (and several were heard) the end result was a mass declaration of fealty to the Gruening regime. One Gruening creature, Bobbie Sheldon, criticized his opponent for the office of auditor, saying that Auditor Moore had 'let the party down.'"

And then going down to the next paragraph: "After the candidates had been heard, the assemblage was treated to [40] a ten-minute talk by Governor Gruening. His Excellency, as he was affectionately addressed, brayed happily about the successes enjoyed by the Truman administration and his own and went on to take a few pot shots at a group of Juneau citizens whose views are apparently at variance with his own."

The editorial concludes: "Certainly, socialism for Americans was not the aim of either Jefferson or Jackson. Neither, we think, was Trumanism or Grueningism."

And an editorial for September 13, 1951, in the Empire, "Another Stab in the Back." It is discussing the removal of the Secretary of Alaska, Lew Williams. The opening paragraph reads as follows: "The removal of Secretary of Alaska Llewellyn M. Williams is the latest in the long series of Gruening purges, although the governor insists, with wide-eyed innocence, that he 'had nothing to do' with Williams' dismissal. Ananias was a piker.

"We find ourselves unable to swallow that denial. It is unthinkable that any governor's second-in-com-

mand would be dismissed except on that governor's recommendation. Certainly no such removal could occur without his knowledge and consent."

The editorial ends: "We wonder how much longer the Department of the Interior will continue to humiliate the people of Alaska by subjecting them to the one man rule of 'Alaska's Little Caesar.'" [41]

Q. (By Mr. Kay): Governor, do you happen to know who Ananias was?

A. Well, he was a famous character in Greek mythology who was noted as an invariable liar. The word "Ananias" is equivalent for liar.

Q. So to say that Ananias was a piker, with reference to you, is to say that——

A. That is right.

Q. ——that you exceeded Ananias in your ability to lie? A. That is right.

Q. Is there any other implication possible to be drawn from that? A. No.

Mr. Kay: The editorial of Friday, September 7, 1951, in the Empire—we have another editorial, entitled "Trouble in Paradise," and it is a complete discussion of, or completely devoted to Governor Gruening's address before the Alaska Science Conference at McKinley Park. The editorial says: "The governor, according to the Associated Press, expressed himself as being of the belief that the Interior Department is retarding the growth and prosperity of the Territory," says the Empire. "Now, far be it from us to dispute such an obvious truth, al-

(Testimony of Ernest Gruening.)

though it becomes one of the infrequent occasions when we find ourselves in accord with Governor Gruening in matters of governmental policy. [12]

"We subscribe wholeheartedly to his expressed belief that the Interior Department is indeed a deterrent to the Territory's economic development, but we are intensely curious as to the reasons prompting his unusual observation."

And then they go on to question his motives.

"For unusual it is. Ernest Gruening has long been an Interior Department man and has long supported the more than somewhat socialistic projects and policies of that department. And, in turn, the department has gone to bat for the governor in time of need.

"Having learned the hard way to be suspicious, we are prone to speculate in the Governor's motives in expressing such a sentiment. We are aware that Dr. Gruening is far too astute a politician for this to be dismissed as a slip of the tongue. So there must be another—and a more practical—reason."

It goes on to discuss this question in such terms as: "On the optimistic side, we wonder if this could mark a step to the right. Perhaps the author of the well known diatribe against private ownership of utilities has undergone a change of heart in the years between publication of 'The People Pay' and today's grabbing campaign by the Bureau of Reclamation (another creature of the sprawling Interior Department).

(Testimony of Ernest Gruening.)

"Or, can it be that ex-Republican Gruening has [43] repented his ways and contemplates a return to the GOP fold?

"We don't profess to know the answers. But we certainly are curious."

The Court: I think possibly it should be made clear to the jury that these editorials are not introduced in evidence for the purpose of indicating whether or not any damage should be based upon the editorial complained of, of September, 1952: that is, there is no claim before this Court or jury with regard to these editorials: but only to show the question of what we call malice, to show the intent and purpose with which the publication complained of was issued: and there is no possible damage could be predicated upon these editorials.

Mr. Kay: I am glad that your Honor brought that out. It is not the purpose of course. The entire basis of the lawsuit and the damages that we claim are entirely related to the issue of September 25, 1952. These are merely, as his Honor has pointed out, as evidence of what the Governor has characterized as a campaign over a long period of years against him by the Empire, of which this was merely the last straw.

Q. (By Mr. Kay): Now, Governor, something that I probably should have done earlier in the testimony and just overlooked. I will show you a copy of the Alaska Daily Empire for October 8, 1952, and ask you if that is, from your experience and as a reader of the Empire over a [44] long period of

(Testimony of Ernest Gruening.)

time, perhaps typical of them as usual front page layout?

Mr. Faulkner: In the event [illegible], I will object to anything that occurred after September 25th, that was the basis of the charges here.

Mr. Kay: Well, your Honor, I am only offering this—one of the affirmative defenses, as I understand the law which Mr. Faulkner has offered, is fair comment, or, as it is sometimes put, a qualified privilege, and in that respect I think it would be relevant. Certainly, that privilege would be destroyed perhaps—it is my contention that it would be—if there is an overemphasis, an overplay, in the news story, going beyond fair comment and fair criticism, and I have ample authority in that regard. I have many other copies of the Daily Alaska Empire here. I didn't pick this one out for any other purpose, nothing whatever except to show contrast and layout between a normal day's publication of the Alaska Daily Empire in the opinion of this witness which of course——

The Court: I understood from the objection of Mr. Faulkner that what was offered here was something which occurred subsequent to September, 1952.

Mr. Kay: Just a few days.

The Court: And his objection was that that would not be relevant.

Mr. Kay: It was only a few days later. [45]

Mr. Faulkner: I would like to see it.

The Court: For the purpose offered, merely for the purpose of comparison, I see no objection.

(Testimony of Ernest Gruening.)

Mr. Faulkner: I wonder if I could see it.

Mr. Kay: Certainly. I picked it because there didn't appear to be anything controversial about this case or anything else, counsel.

Mr. Faulkner: Is there any particular thing in there?

Mr. Kay: Not a thing, as far as I can see.

Mr. Faulkner: No objection.

Mr. Kay: Only for comparative purposes, I offer that.

The Court: It may be admitted for the purpose offered.

Clerk of Court: This will be Exhibit No. 7.

Mr. Kay: Just offered, ladies and gentlemen, for the purpose that I have explained to the Court, which I know most of you heard, just to compare what the Governor, at least in his opinion, has testified is a typical copy or front page of the Alaska Daily Empire with the page of which we compare—I mean, of which we complain—and both of them of course will be before you. The most important news on this page appears to have been that Juneau held a municipal election and named three councilmen [46]

Mr. Faulkner: That is for the purpose of showing what he thinks it should be.

Mr. Kay: Just for the purpose of showing comparison.

Mr. Faulkner: Yes.

Mr. Kay: In other words, it relates entirely to the opinion of the Governor between those two

(Testimony of Ernest Gruening.)

papers. I could compare the day that the Yankees won the World Series, the following day, but it does contain an editorial relative to this matter, and so I did not do so.

The Court: Then, you are not offering, counsel, as you suggested in your opening statement, any publications to show this malice after the date of the publication complained of? You did say in your opening statement you intended to offer that.

Mr. Kay: You are correct, your Honor.

The Court: My question is of the time. You are not making such offer?

Mr. Kay: We believe that there are two items which are certainly relevant. It was not my intention, frankly, to offer those two items at this time as part of our case, and I will be frank about it, but to offer them perhaps as a matter of—they are properly part of the defendant's case, may I say, and I believe that they will end up perfectly properly before the jury, but it was not my intention to offer [47] them as part of the plaintiffs' case.

The Court: Very well.

(Whereupon, Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; the witness Ernest Gruening resumed the witness stand, and the Direct Examination by Mr. Kay was continued as follows:)

Q. Governor, I will show you an item which is labeled "An Open Letter to the Editor," dated No-

(Testimony of Ernest Gruening.)

vember 7, 1952, and ask if you received this copy of that letter and whether or not it was later, or at about that time, printed in the Alaska Juneau—I mean, the Alaska Daily Empire.

A. Well, I think it was published. I am not positive.

Q. You did receive that copy? A. Yes.

Q. You did receive that copy from the author of it; am I correct? A. Yes.

Q. And, as far as you know and believe, it was printed by the Alaska Daily Empire?

A. Well, I am not positive, but that surely could be ascertained. I imagine it was printed.

Mr. Faulkner: You are offering this in evidence?

Mr. Kay: Yes.

Mr. Faulkner: We object to this in evidence. It [48] is a letter written by some man to the Empire—it is purely hearsay; it has nothing to do with the case—expressing his views on three or four different things, and it is purely hearsay and objectionable for that reason.

Mr. Kay: I thought it might be admissible——

Mr. Faulkner: It is immaterial and incompetent evidence.

Mr. Kay: I thought it might be admissible, your Honor, on two points. First, it was printed in the Empire, and it is offered in regard to Paragraph 2 of the letter to show—and I will show it to the Court—to show that certain of the public, the effect upon certain of the public of the front page of which we complain.

(Testimony of Ernest Gruening.)

The Court: Such a letter must appear material even thought it was published or otherwise.

Mr. Kay: We have been informed that it was published. We have searched our papers and can't find the copy in which it was published.

The Court: It has not been definitely established that it was published. If it is the purpose to show the effect of the articles complained of upon the public, that should be material here.

Mr. Faulkner: The letter actually is referring to the whole policy of the paper, written by a third person who has nothing to do with the case at all. Whether it was [49] published or not, I don't know.

Mr. Kay: A person——

The Court: Just a moment while we examine this.

Mr. Kay: Yes, your Honor.

Mr. Faulkner: We could have a dozen letters like that talking the other way. To introduce them it would prolong this case all winter.

The Court: The element of damage, as brought in issue here, the element of damage would include the reaction of the public to the editorial and articles complained of. The letter being offered for that purpose, to show the reaction of this individual to the articles, appears material.

Mr. Faulkner: I don't think it does, your Honor, show any particular reference to these articles. I read it hastily. I don't see where it does.

Mr. Kay: Paragraph 2.

(Testimony of Ernest Gruening.)

The Court: Their editorials generally.

Mr. Kay: Paragraph 2.

Mr. Faulkner: We could introduce a dozen others the other way.

The Court: Well, that still would be permissible. It is relevant evidence. For the purpose offered, the letter may be admitted in evidence.

The Clerk: That will be Exhibit No. 8.

Mr. Kay: The letter is as follows: "Juneau [50] Methodist Church. Fred McGinnis, Minister. Juneau, Alaska, November 7, 1952, Open Letter to Editor of Empire. Editor, Daily Alaska Empire, Juneau, Alaska. Dear Sir: In order to be candid and honest in reacting to your paper's policies with regard to your editorials and other articles, I would like to express to you the following:

"1. Your editorials generally are the poorest and worst written of any this citizen has ever seen in any newspaper anywhere, barring none.

"2. Your editorials seem to be dedicated to causing the public to 'feel the worse' toward our Governor and a few other men. It seemed to me that you tried to cause the public to think of the Governor as a dishonest, mis-appropriating, unworthy man. You succeeded as far as I was concerned until other information threw different light on certain policies."

"6. Your editorial of November 6th, in which you by implication invite the Governor to leave the Territory, was to my mind the lowest, cheapest and most unworthy type of editorial"——

The Court: That portion is objectionable. We

(Testimony of Ernest Gruening.)

had reference only to your Paragraph 2 in which the writer states that he was convinced that the Governor was dishonest by these editorials.

Mr. Kay: I agree with the Court. [51]

The Court: The balance of it should be disregarded by the jury.

Mr. Kay: I would be perfectly willing to have the balance of the letter either eliminated or the second paragraph clipped out.

The Court: That would be satisfactory.

Mr. Faulkner: May I see it again?

Mr. Kay: Yes, sir. We can clip out the second paragraph as far as I am concerned. The rest of it is irrelevant.

The Court: The rest of it is hearsay.

Mr. Faulkner: I think the letter or any portion of it is inadmissible. Mrs. Monsen tells me it was published in the Empire, together with a letter criticizing it, which they published; in a day or two there was another letter, criticizing this one very severely, published in the Empire. But we couldn't bring the Empire files down here. They weigh tons. You can see how helpless we will be if such things as that are admitted into evidence here.

The Court: Counsel, I don't know that we have made our point clear. If the editorial was published, as you concede, the letter was published, it does not help the situation. Here is a letter from a minister who states that he was convinced by these editorials that the Governor was dishonest. [52]

Mr. Faulkner: No, I don't think he said that.

(Testimony of Ernest Gruening.)

The Court: That is what he says in the letter. And for that purpose that portion of the letter is admitted in evidence. The balance of it may be cut out as counsel has suggested.

Mr. Kay: I will clip out Paragraph 2 and paste it in the middle of a sheet of paper.

The Court: Yes; together with the letterhead.

Mr. Kay: May I merely read the signature?

The Court: Yes; and the signature.

Mr. Faulkner: I ask the Court to renew our objection to the admission of the portion of the letter.

The Court: The objection is overruled.

Mr. Kay: The signature is that of Fred McGinnis.

Q. (By Mr. Kay): Do you know who Fred McGinnis was, Governor?

A. Fred McGinnis was for several years, three or four years, the pastor of the Methodist Church in Juneau, and then he was moved to be the pastor of the Methodist Church in Anchorage, where he is now.

The Clerk: Just Paragraph 2, counsel?

Mr. Kay: Yes; just clip out Paragraph 2, and the signature maybe.

Q. (By Mr. Kay): Oh, one thing, Governor. In connection with our second exhibit, this group of papers which [53] shows the elimination of your name, what was the purpose of calling those to my attention, sir, or my calling them to your attention?

(Testimony of Ernest Gruening.)

A. Well, I think it is just one piece of evidence of this long hostility. I don't know that those particular deletions hurt me any, the way the other things did, but the paper certainly must have gone to a lot of trouble every time a story came in involving the Governor to go through it with a blue pencil and take out his name, and, certainly, instructions to that effect would indicate that the paper had a very definite bias against me. I have never heard of that performance in any other paper. It was part of the news to leave my name in when I was associated with some public act that was worth reporting.

Mr. Kay: I believe that is all. Your witness, Mr. Faulkner.

Cross-Examination

By Mr. Faulkner:

Q. Governor, you didn't suffer any harm having your name left out?

A. As I say, I don't think those particular omissions did me any harm.

Q. Now, do you know Mr. Carter, who was at one time editor [54] of the paper while Mrs. Monsen was sick in the hospital in Seattle?

A. Oh, yes.

Q. And you had some trouble with Mr. Carter?

A. No.

Q. Did you have some controversy with him, arguments with him?

(Testimony of Ernest Gruening.)

A. Oh, I guess so; I mean, no particular trouble.

Q. Do you recall whether you even asked Mr. Carter at one time to leave your name out of the paper?

A. No; no. What you have—what I think you have in mind is that, when we gave out releases, I asked him to print them as written and not to cut them and change their meaning and that I would prefer to have releases from the Governor's Office printed as given or not at all.

Q. And the reason—he had cut something that you had given him?

A. Yes. He had cut something to change its emphasis.

Q. Well, Governor, do you recall whether Mr. Carter didn't complain to you that these items that you were giving him to publish were given him, generally, too late to get in the paper and were given to the radio, so they had it first in the evening, and he wouldn't get them until they were secondhand the next day, and that, in order to publish this particular one and get it in the [55] paper in time, he had to cut it; do you remember that?

A. I remember it very well, Mr. Faulkner. The cutting consisted of two sentences and, therefore, could not have possibly delayed the publication. It was a release of considerable length, and cutting out two sentences, which were important sentences, and leaving them in would not have made any difference in time at all.

Q. Do you remember what they were?

(Testimony of Ernest Gruening.)

A. Yes. They had to do with the closing of the Alaska Juneau Mine, and the sentences, which were cut out, were to the effect that the mine had discharged these men in great haste and that it was very unfair to the men not to give them more warning, and the Empire, evidently, considered that was a criticism of the mine management and wanted to delete them for that reason. I thought it was part of my statement. It was a statement signed not only by me but by three other officials, and we took the responsibility for it, and there was no reason why he should take it upon himself to edit our ideas out.

Q. Was that the only occasion when he had to cut things that were given to him late; do you know?

A. Well, offhand, I don't recall any others, but there may have been some. If you can bring any to my mind, I may be able to recall them.

Q. Well, maybe later on. Do you know, about this letter of [56] Mr. McGinnis', don't you know that, as a matter of fact, that letter was written by your secretary? A. What?

Q. The letter that you just read from Mr. McGinnis, wasn't that signed by your secretary, Mrs. Alexander—written by your secretary, Mrs. Alexander, and signed by Mr. McGinnis?

A. That would be very startling news to me. I don't believe it for a moment.

Q. You don't know that?

A. I think that the minister of the Methodist Church, Mr. McGinnis, was perfectly capable of writing his own letters.

(Testimony of Ernest Gruening.)

Q. Yes; but I am asking about this particular one. You don't know?

A. I do not know that anybody but Mr. McGinnis wrote it.

Q. Well, you don't know whether Mrs. Alexander wrote it or not? A. Of course not.

Q. No. Now, let's—— A. Did she?

Q. Well, I am not on the stand. We will come to that later on. Now, Governor, you complain of the policy of the Empire.

Mr. Faulkner: I wonder if the Court will bear with me a minute while I—— [57]

Q. (By Mr. Faulkner): Governor, while it is on my mind, while I am finding this, you referred to a hearing up there on the public lands before a Congressional committee where you had appeared first and made a very excellent statement and I appeared afterward and I couldn't say much except to second what you had said and to try to emphasize to the committee that that was correct, and you say—I didn't know this—but you say the Empire published what I said and not what you said?

A. That is right.

Q. Well, could it be that the reporter didn't get up there in time to hear you?

A. That is entirely possible, but that would present no difficulty to a good reporter. He could have asked me what I said. He could have found it out from the record. A written transcript was being made, and he could easily have verified that. That is just common newspaper practice.

(Testimony of Ernest Gruening.)

Q. He could have asked me, and I certainly would have told him, because, do you remember, the next day at the Chamber of Commerce we made a report on this meeting and I reported there on it and gave you the credit and said that what you had said covered the whole ground very plainly, and the Empire did publish that?

A. Well, you were particularly generous in your testimony [58] about my testimony, and that seems to me makes the Empire's omission all the more striking.

Q. Well, on that occasion. But the next day, or maybe two days later, when the Chamber met and we reported it there, the Empire did then refer to my comment on your statement.

A. Well, that was very kind of you.

Q. Now, Governor, you have laid some stress on the fact that the Empire was hostile to you and critical and carried on a campaign against you and your associates. Now, when you came to the Territory as Governor, I will ask if—first—just strike that please. I will ask if it isn't a fact that Mrs. Monsen after her father died became the managing editor and publisher of the Empire, and, as you know, she and her sister own it. Now, when you were appointed Governor, did she send you any telegrams to Seattle when you were on your way to Alaska?

A. I think she did.

Q. These are preliminary, Governor. Did she send a telegram and order some roses placed in your room for Mrs. Gruening? Do you remember that?

(Testimony of Ernest Gruening.)

A. Well, I don't recall it, but she may have.

Q. And then did she—perhaps you will remember this—did she send you a telegram and say she would like to arrange to have a tea for you the day you arrived, if you recall? [59]

A. Well, I think I can answer what you are trying to get at by saying that Mrs. Monsen was very hospitable to us when we arrived.

Q. And, when you arrived to take the Office of Governor, did the Empire publish—December 5, 1939, it seems to be—this editorial which I will hand you? A. Yes, Mr. Faulkner, it did.

Q. And there was no complaint about that?

A. None.

Mr. Faulkner: I would like to offer this in evidence in connection with the cross-examination of the Governor, an editorial, obviously.

Mr. Kay: No objection.

Mr. Faulkner: Could I have it marked as a Defendant's Exhibit ?

The Clerk: This will be Defendant's Exhibit A.

The Court: The exhibit may be admitted.

Mr. Faulkner: This is not too long, and I would like to read it to the jury now. It is entitled "Our New Governor."

"Juneau extends a whole-hearted welcome today to Alaska's new Governor, Ernest Gruening, who, about the time today's Empire is thumping against the front doors of the town, is taking his oath of office to succeed John W. Troy.

"Dr. Gruening comes from a position in Wash-

(Testimony of Ernest Gruening.)

ington [60] of broader interest and probably wider day-by-day active authority than the office he will fill here. His able administration as Director of the Division of Territories and Island Possessions is recognized and appreciated by Alaskans.

"He comes to an Alaska prospering in its present and, more important, ripe for further development in the immediate future. That Governor Gruening can help Alaska along its path of destiny to eventual statehood none of us doubt.

"The Territory's one element of disappointment as it looks on its new Governor is that a resident Alaskan was not chosen for the office, and this is no reflection on Governor Gruening. As has been said often since his appointment was first announced, Dr. Gruening is Alaska's first choice for Governor if a non-resident it must be. In fact, he becomes an Alaskan today and as such we will look on him henceforward. He has a close acquaintance with the Territory through his work in the position he has just resigned. Delegate Dimond pays Dr. Gruening the high tribute of giving him credit for doing more for Alaska than any other man in Washington officialdom. In his several visits to the Territory, Dr. Gruening has traveled over more of Alaska and seen more of life in the north than have many Alaskans.

"Greetings, Governor Gruening, we are all for you. May you be with us many a day! [61]

"Retiring Governor Troy needs no reaffirmation

(Testimony of Ernest Gruening.)

of the very high esteem in which all Alaskans hold him."

Well, that has nothing to do with it.

Q. (By Mr. Faulkner): Now, Governor, when you came here your relations were friendly with the Empire? A. Yes, they were.

Q. And how long did they continue friendly; do you remember?

A. Well, I think more or less for several years. I wouldn't know the exact date at which they started to be less friendly, but I think after a year or two.

Q. And do you know why? What occurred?

A. Well, I have some ideas on the subject.

Q. Well, wasn't it a matter of disagreement with some of your policies or things you advocated; wasn't the criticism largely based on that?

A. I don't think so.

Q. Well, isn't that a usual thing, for a newspaper to criticize public officials if they don't agree with their public acts?

A. It is perfectly correct and proper to criticize them within certain bounds of decorum and decency.

Q. And they differed—the publisher and editor differed with you in many respects in public matters; isn't that so?

A. Well, they expressed that difference; [62] yes.

Q. Now, you were telling here early this afternoon about the effect of these publications upon you and in the Territory. Now, I will ask you if it isn't a fact that you continued on as Governor even

(Testimony of Ernest Gruening.)

though there was a change in the national administration; you continued on as Governor until the end of your term?

A. Well, there was no change of administration during my first term or second term.

Q. No. I mean, your last term? A. Yes.

Q. That was for the year in which the editorial, the publications, were made; that was '52, wasn't it?

A. Yes.

Q. There was a change of national administration then?

A. Well, I merely completed my term.

Q. Yes; you finished out your term?

A. Yes.

Q. And there was no change made until then, and you stayed on through a session of the Legislature after the change of administration?

A. That is correct.

Q. And then, when you left the Territory, you had some rather eulogistic editorials, published in some other papers? A. Yes. [63]

Q. And one, especially, in the Anchorage Times which referred to you as Alaska's greatest Governor? A. That is correct.

Q. Do you remember that? A. Yes.

Q. So that there was no change in the sentiment or feeling among your friends because of what had been published in the Empire in September, 1952?

A. Well, I think Alaska was divided.

Q. Well, it was divided before, wasn't it, Governor, somewhat?

(Testimony of Ernest Gruening.)

A. Well, I think the division became somewhat sharper as a result of the Empire's policies.

Q. Well, the Anchorage Times did in publishing this very eulogistic editorial refer to you as Alaska's greatest Governor?

A. That was very kind of them.

Q. It was, and perhaps proper, although it might be some reflection on Governor Parks, Governor Troy and some others. And then, Governor, didn't a group of your friends raise money and present you with a Chrysler automobile?

A. They did.

Q. Yes. So that they were still your friends, those who presented the car. I will ask you if the story of that [64] was not published in the Empire just as it occurred? Do you remember that?

A. I see no reason to doubt that it was published.

Q. I will hand you this to remind you of it.

A. Yes; that is correct—"Alaska Friends Present Car to Ernest Gruening."

Q. Yes.

Mr. Faulkner: I will offer this.

Mr. Kay: No objection.

Q. (By Mr. Faulkner): That was, I think, Governor, in all the papers all over the Territory?

A. I think so; yes.

Mr. Faulkner: I will offer this then in connection with the cross-examination.

The Court: Defendant's Exhibit B.

The Clerk: Defendant's Exhibit B; yes.

Q. (By Mr. Faulkner): Now, Governor, you

(Testimony of Ernest Gruening.)

went into some length as to the offense that you felt when these stories were published in the Empire in September, 1952. Now, let's go back to the ferry fund. You said that the Board of Road Commissioners decided to handle the ferry funds in the way they were handled by turning the matter over to the purser of the ferry? A. Yes.

Q. And you said that was done for the sake of—well, more [65] efficient or something to that effect?

A. Well, it was to enable the men to be paid when they finished their run and not have to wait for several days, without which it would have been impossible to keep the crews. They just wouldn't have worked.

Q. And there were many other things paid too, weren't there?

A. Well, that I don't know. That was beyond my——

Q. You were chairman of the Road Commission?

A. Well, it was handed over to the Highway Engineer and to the purser, and I am not familiar with the details of what took place.

Q. But the Board did that; I mean, the Board of Highway Engineers authorized the purser——

A. The Board of Road Commissioners.

Q. The Board of Road Commissioners authorized the purser, Mr. R. E Coughlin, to handle the funds and to pay the bills. Now—and to do that he opened a bank account—that would be a private bank account, wouldn't it?

A. Well, it would be a bank account of pubile

(Testimony of Ernest Gruening.)

funds in which he had been delegated the power to disburse. I wouldn't call it a private fund.

Q. Now, you said a little while ago that it wasn't a private fund; it was a public account. Wasn't it a private account handling public funds? Wouldn't that be the way to state it? [66]

A. Well, I think that is more or less quibbling over words. It was not private, in that he did not own that money; no private citizen owned it. It was a public fund, used for public purposes, in which an official delegated by the Board had the power to sign checks.

Q. And that was under the control of a man who was not a Territorial official?

A. Well, he was a Territorial employee in that he was——

Q. Did he have a bond to the Territory?

A. That I do not know.

Q. Well, now, do you know—did you know that in handling the funds that way a considerable portion was lost and not accounted for, that there was a shortage of funds?

A. No, I do not know that, and I doubt whether the Empire knew it when it published that libelous story.

Q. Of course that doesn't make any difference, Governor. I am asking if you know it.

A. I do not know it; no.

Q. The truth is a defense wherever found and whenever found. Now, do you know—you were in office at the end of 1952, the calendar year 1952—

(Testimony of Ernest Gruening.)

now, do you know anything about the audit of the Territory's accounts by the Arthur Anderson Company of Seattle?

A. Well, I know there was such an audit.

Q. You know there was such an audit? [67]

A. Yes.

Q. Did you know that in that audit Arthur B. Anderson & Company found that there was a shortage in this ferry account? A. No.

Q. Did you know that they also found that the account had been kept in such an irregular and illegal manner that there probably was a greater shortage than they were able to discover?

A. I do not know those facts.

Q. Do you know that they reported that the purser claimed that there was a greater shortage, as nearly as they could get the information there appeared to be a greater shortage than they actually found; do you know——

A. I do not know those facts.

Q. You never read the Anderson report?

A. No.

Q. Do you know who Arthur Anderson & Company is? A. Yes.

Q. Now, did you know that the purser, who was handling these funds, was issuing checks for cash and taking cash out and paying bills and sometimes issuing checks for people and then cashing them and making certain deductions?

A. No, Mr. Faulkner; I knew nothing of the details of the [68] operation of the ferry after it had been turned over to——

(Testimony of Ernest Gruening.)

Q. But you were present at that meeting of the Board, June 5, 1952, when this was authorized to be done? A. Yes.

Q. Now, do you know—you talked about Oscar Olson and you said Oscar Olson was a thief—do you know under what statute Oscar Olson was sentenced?

A. Well, I am not a lawyer and I can't give you the chapter and verse, but I know that he was sentenced for embezzling many thousands of dollars of Territorial and Federal funds.

Q. You didn't have in mind the particular statute it was filed under: is that what you mean?

A. Well, I don't think I would know it by number or——

Q. You didn't read it?

A. No. He pleaded guilty, and there wasn't any question about his guilt in the matter.

Q. Yes; that is true. Excuse me just a moment. Now, Governor, you had mentioned Mrs. Monsen's hostility to you, and I asked you if that wasn't in connection with your official acts as Governor, and nothing personally, but purely relating to your official acts. I will ask you if you had any controversy with anyone in the Empire about the Palmer Airport Report by the United States Senate? [69]

A. Well, there was of course considerable interest on the part of the Empire reporters and staff about that whole matter.

Q. And there was on the part of some other newspapers too?

(Testimony of Ernest Gruening.)

A. Oh, yes. It was a matter of general interest.

Q. And on the part of the United States Senate which investigated it? A. Yes.

Q. And the Empire took the stand that there had been violations of the law there, didn't they?

A. They took that stand; yes.

Q. And you took the stand that it was slander to say so?

A. I took the stand that the transaction did not justify those criticisms, and that was demonstrated by the fact that the Comptroller General finally paid the bill.

Q. And, now, at the time that the publications occurred in Alaska about the Palmer Airport, the Senate committee had made a report?

A. Yes.

Q. And in that report they found that there were irregularities and they found that an attempt had been made to get $145,000.00 unlawfully from the United States?

A. No; I wouldn't agree that that was the verdict.

Q. I mean, the report, the report of the Senate committee?

A. Well, the facts were, as I saw them and as I still see [70] them, that this was the first of four airports, one in each judicial division, which were being constructed under the new Territorial Airport Act which had the use of Federal matching funds. The Federal Government passed this act in '46. The '47 Legislature had not taken advantage

(Testimony of Ernest Gruening.)

of it by passing an enabling act, and it was not until '49 that such legislation was passed. It was new legislation for us, and the Territorial Board of Aeronautics was guided by the Federal officials, the C.A.A. officials, who had the final responsibility, and it was upon their advice that we took the acts that we did, and, if there has been anything improper or illegal or dishonest about it, they would have been subject to prosecution, but, as a matter of fact, they were not only not prosecuted but they were promoted, and the net result was simply a smear in the Territory that we had done something that was highly improper.

Q. Well, at the time this publicity was given to this, wasn't there a Senate Report on it which indicated that it was highly improper?

A. Well, the Senate Report was critical of some of the methods that we used in order to speed operations, but that report rather petered out when the Comptroller General reviewed the whole proceeding and authorized the payment. [71]

Q. Well, when did he do that?

A. Subsequently.

Q. Do you remember when?

A. Oh, after the Senate Report had been issued and a lot of pressure was put upon him not to pay it.

Q. In making this report——

The Court: Before pursuing that inquiry further, counsel, aren't we going rather far afield, or

(Testimony of Ernest Gruening.)

do you consider this proper cross-examination for this purpose?

Mr. Faulkner: Well, Your Honor, the Governor talked a good deal about the editorials and publications in the paper as constituting malice or a malicious attitude toward him, and I thought I was entitled to cross-examine him to show just what he considered malicious, and I was going to ask him some questions about this Senate Report, which of course was the basis of the publications in the papers throughout the Territory on that particular thing, and, then, I think I did ask the Governor if he didn't refer to that as slanderous.

The Court: Very well. You are entitled of course to rebut this matter of malice.

Mr. Nesbett: Of course, Your Honor, it is common knowledge that anything the Senate says can't be slander.

The Court: Well, I do not wish to go into that. That is what I am trying to avoid, counsel, getting into a collateral inquiry as to whether a Senate matter is slanderous. [72]

Mr. Faulkner: I am not saying it is slander.

The Court: I do not want to get into that.

Mr. Faulkner: No.

The Court: That is why I asked counsel the question.

Mr. Faulkner: It can't be slanderous.

The Court: We are not concerned with that. We are concerned only with the relations between the Governor and the Juneau Empire. But, if the cross-

(Testimony of Ernest Gruening.)

examination is for that purpose, it is permissible.

Mr. Faulkner: The cross-examination is for the purpose of asking the Governor what he said it was, not what the Senate said.

The Court: Yes; that is proper.

Q. (By Mr. Faulkner): Now, Governor, in the findings and conclusions of the Senate Report—I think you criticized the paper for publishing that, didn't you? Didn't you say that—not referring to the Empire but referring to the authors of this Report—that it was slander?

A. The authors of the report?

Q. Yes.

A. Well, I don't recall that. I know that I made a contribution at the request of the committee giving my views, and it was omitted from the printed report. They claimed that it had been lost in the clerk's office down there in the Senate and they printed it separately, but [73] of course it never reached all the people that were reached by the original report, and, if you have the complete documents, you must have my statement, which I would be very glad to have introduced in the record. That gives my views as I expressed them officially to the United States Senate.

Q. Now, in this Report—first, I will ask you if it was published in the report, if it was published in the paper that you characterized this report as slanderous; would you say that that is true or not true? A. Well, which Report?

(Testimony of Ernest Gruening.)

Q. Well, the Report of the Senate Subcommittee on the Palmer Airport.

A. No; I would not characterize the report——

Q. You did not? A. No.

Q. Well, did you refer to anybody's remarks on it as slander?

A. Well, I may have, because I think that some of the editorial comment at the time was of that nature. I think the comment in the Empire was of that nature.

Q. I think you referred not to the Empire but to some others who commented on this as slanderous. And in the Report didn't the Senate committee not only censure the officials of the Alaska Aeronautics Board but also those of the Civil Aeronautics Authority whom you mentioned as sanctioning [74] this? Weren't they condemned too?

A. Well, I think they were criticized.

Q. Yes.

A. But, nevertheless, they did not consider the final judgment as the subsequent facts revealed. Now, the fact of the matter was that the implications in the Empire and similar critical publications were very similar to those in this article which forms the basis of the suit, the implication that there had been personal dishonesty, that some Alaskan officials had profited. If we committed any offense, it was that we were trying to get something for the Territory and get it quickly and to achieve something in return for the long delay that it pre-

(Testimony of Ernest Gruening.)

vented any airports from being built. That was our only offense. Nobody stood to profit by it.

Q. The Report was that you were trying to do that at the expense of the Federal Government?

A. Beg pardon?

Q. The Report of the committee is that you were trying to do that at the expense of the Federal Government?

A. Well, we did not consider it so. We thought it proper to get just as much Federal money as we could for that purpose.

Q. Well, I will just ask you if this appears in that Report, if you recall: "In view of all available facts presented [75] to such committee, we conclude that Edward G. Fisher, Chris Lindsey, and possibly other C.A.A. officials in the Alaska Regional Office were aware of the devious methods which were being employed by Territorial officials in their efforts to obtain Federal matching funds for the Palmer Airport. Furthermore, the C.A.A. officials in Alaska failed in their duty to disclose fully these facts to the C.A.A. officials in Washington who were handling the case." That was in the Report, was it?

A. Yes. Well, what does that amount to?

Q. What it amounts to is that——

The Court: That is precisely what the Court—I understood, counsel, that your purpose in this examination was to show some—to rebut any evidence of bias between the Governor and the paper.

(Testimony of Ernest Gruening.)

Now, then, how do you contend that what you have here shown is material?

Mr. Faulkner: Your Honor, the Governor has been trying here to make out that the paper was angry at him and they had a bitter feeling and they were malicious and that they published these things because of that. Now, I want to show his feeling toward the paper based on things that they published which were proper to publish, and that this report was one of the things he complained of, and, as I asked the Governor, if he didn't say that these reports were slanderous, and he said he probably did; he doesn't know just who it was [76] aimed at. I think that is proper.

The Court: Strictly speaking, in cross-examination we are not confined to strictly relevant matters, and it may be proper cross-examination.

Q. (By Mr. Faulkner): Now, Governor, have you had some controversy with the Empire over the Union Bank of Anchorage, didn't you, with some of their publications?

A. Well, I really don't recall what you would call a controversy. This was a matter that was handled at various times by the Banking Board and by the Legislature. I wouldn't say that I had any controversy with the Empire over that. I think, if you want an answer to your question as to why the Empire seemed to turn on me, I can give it to you, but it has nothing to do with the publications.

Q. Well, I want to find out if you didn't object

(Testimony of Ernest Gruening.)

to these publications and why, and, perhaps, the jury can form its own conclusions.

Mr. Nesbett: Your Honor, now we are going into another subject that seems to me to be entirely and completely collateral and irrelevant. How far are we going on this? The question of what the Governor may have done or said in his official capacity and in connection with the Union Bank has nothing to do with this suit at all. I don't know how Mr. Faulkner can possibly use it to rebut or offset any of the [77] Governor's testimony with respect to the bias of the Empire.

The Court: Well, I do not know either.

Mr. Faulkner: He said the policy of the Empire was one of animosity toward him, and I want to show if that didn't work both ways and that there were things that came up here of vital public interest that the Empire published and published editorials and comments on that were correct. The Governor has come on the stand here this morning and introduced a vast array of editorials and clippings from the paper, to show that they had animosity toward him, and I want to show what was the basis of their difference with him, to show it was not animosity at all. I have got a right to do that.

The Court: Counsel, yes. Can we not, however—can you not limit your inquiry, however, as to the attitude between the Governor and the paper rather than going into the merits of these collateral matters?

(Testimony of Ernest Gruening.)

Mr. Faulkner: I didn't do that.

The Court: Well, we did on this Palmer deal. Now, I would like to suggest we avoid such on these other deals. It is purely a waste of time.

Mr. Faulkner: I don't want to go too far into this and I think I have already buttoned up the Palmer thing. I wanted to bring out the question of whether the Governor was not angry himself at these publications which were justified by the Senate Report. [78]

The Court: Well, your inquiry may be proper along those lines; but, if you will kindly stay away from going into the issues, the collateral issues.

Mr. Faulkner: I haven't gone into anything in connection with the Union Bank except to ask a preliminary question.

The Court: Very well.

Mr. Faulkner: And I want to follow it up with one that is very pertinent.

Mr. Kay: Well, now, Your Honor, I take it that Mr. Faulkner then is finished with the discussion of the Palmer Airport, and I didn't hear one word about the Juneau Empire being critical or any demonstration in the Juneau Empire of criticism of the Palmer Airport situation.

The Court: Well, counsel, we are now on another subject. We are on the subject about something to do with the Union Bank, at which time the objection was made by Mr. Nesbett. We have ruled upon that objection. I think we are through with the airport.

(Testimony of Ernest Gruening.)

Mr. Kay: The whole point was, as Your Honor pointed out—we have no objection whatever if Mr. Faulkner can show that Governor Gruening was angry or bitter at the Empire because of its honest difference of opinions with him on the Palmer Airport, but no evidence was introduced of their opinion, so we don't know what it was. Maybe they approved it. [79]

The Court: Under the ruling of the Court he may answer the question if he may—if he can.

Q. (By Mr. Faulkner): Governor, you remember the trouble the Union Bank had at Anchorage in 1947?

A. I remember there was some trouble; yes.

Q. Do you remember an occasion when Doctor Walker, the Senator from Ketchikan, introduced a resolution in the Senate which was quite critical of the Bank and you, as Chairman of the Banking Board?

A. Well, I will be glad to take your word for it. I don't happen to remember it.

Q. You don't remember that?

A. No; but I think, if I refreshed my memory and it was there, I probably could recall it.

Q. Do you remember calling Mrs. Monsen and telling her not to publish that, that it would be libelous—if you remember it?

A. Well, I don't recall it, but, if you say I did, I——

Q. No. I am not——

Mr. Kay: Don't admit it, Governor.

(Testimony of Ernest Gruening.)

Q. I am not saying you did.

A. I don't recall that at all.

Q. I prefer to have somebody else say you did.

The Court: Counsel——

Mr. Faulkner: I didn't say he did. [80]

A. I don't recall it.

Mr. Faulkner: I just asked him a question.

Q. (By Mr. Faulkner): Now, Governor, do you remember in the fall of 1952, November, 1952, the steamship strike that tied up all the transportation here for a long time? A. I do.

Q. Do you remember where you were then?

A. Well, the strike lasted so long I probably was in several places.

Q. Well, weren't you in the States during part of that time?

A. During part of that strike, I am sure I was.

Q. And do you recall whether any other officials were in the States at that time?

A. Well, which ones?

Q. Well, the Commissioner of Labor, the Highway Engineer, the Tax Commissioner, the Attorney General, the Assistant Attorney General, and the head of the Price Administration—or Stabilization—whatever it was—Hanford.

A. Well, they may have been. Of course, you know the Governor has no jurisdiction over elected officials.

Q. You don't remember that. All right. Well, now, Governor, you yourself—I mean no offense by this question at all and no feeling about it—but you

(Testimony of Ernest Gruening.)

yourself made a good many speeches over the radio; you had no paper; but you had speeches over the radio and sometimes articles in the [81] papers that were quite critical; didn't you? A. Of what?

Q. While you were Governor?

A. Critical of what?

Q. Well, to begin with, didn't you have a course of criticism toward what you called absentee capital or absentee ownership?

A. I criticized certain practices of some of the absentees.

Q. And you criticized the Alaska Steamship Company quite freely? A. Yes, I did.

Q. And you criticized the Pan American Airways, didn't you? A. Not that I can recall.

Q. And you criticized the Salmon Industry?

A. Yes.

Q. And did you ever criticize the mining industry?

A. Mining industry? I only recall criticizing the A. J.'s effort to collect $250,000.00 for that rock which would have had to be dumped in the channel if it hadn't gone into the fill.

The Court: Again, counsel, may I inquire as to whether this is proper cross-examination?

Mr. Faulkner: Yes, Your Honor.

The Court: The witness testified, as I remember, Governor Gruening testified, that in his judgment criticisms [82] of public officials in the newspaper were perfectly proper as long as they were fair and honest; so where is there anything to cross-examine

(Testimony of Ernest Gruening.)

upon that point? The fact that he criticizes others, I cannot see where that is proper cross-examination.

Mr. Faulkner: Well, I think the jury ought to know that the Governor of a Territory is immune from prosecutions for his criticisms.

The Court: I will sustain objection to any such examination, and the jury will be instructed to disregard it.

Mr. Kay: I would be very much interested in——

The Court: I have ruled upon it, counsel.

Mr. Kay: ——the citation to that effect.

Mr. Faulkner: Well, I have got plenty. Your Honor, now I want to ask him if he didn't criticize over the radio the Empire.

The Court: Well, that is a different proposition.

A. Yes, I did.

Q. (By Mr. Faulkner): On many occasions?

A. No; not on many.

Q. Some? A. On a few.

Mr. Faulkner: I think that is all. Pardon me just a minute, Your Honor. I want to see if there is anything else here. Oh, yes. [83]

Q. (By Mr. Faulkner): To go back to this ferry fund, were you familiar with the statutes of the Territory that provided how public money should be received and accounted for?

A. Well, yes, I would say so.

Q. And that they had to be turned over to the Territorial Treasurer?

A. Well, in this particular case the Attorney

(Testimony of Ernest Gruening.)

General, that you are referring to, and the past Attorney General, Mr. Roden, both declared that this was a perfectly proper legal proceeding.

Q. Well, did the Attorney General tell you that?

A. Well, it is my impression that he assented and he raised no objection.

Q. Governor, to refresh your memory, at the meeting of June 5, 1952, of the Board of Road Commissioners didn't the minutes simply show that the Attorney General made no objection?

A. Well, I think that is probably correct.

Q. There was no comment by him on whether it was right or wrong?

A. No; but by making no objection he would certainly make clear that he thought it not improper.

Q. Then, when he did write an opinion on it, didn't he state that the funds should be turned into the Treasurer as the [84] law directed and then a certain portion turned over to the Highway Engineer and that used for the operation of the ferry?

A. Well, I would think you would get a direct answer by asking the Treasurer himself. I am not positive as to that.

Q. Well, I was asking you if you knew of the Attorney General's opinion to that effect.

A. Well, really, I don't remember the exact details.

Q. Well, that is all right. But the law required at that time that all funds of every nature be turned over to the Treasurer?

(Testimony of Ernest Gruening.)

A. Well, that was not the opinion of the Attorney General's Office.

Q. But you knew what the law was, didn't you?

A. Well, this particular situation that had come up was not covered by existing statutes.

Q. Oh, it wasn't?

A. Not in my judgment, or not in his judgment, certainly.

Q. As a matter of fact, didn't you do this for expediencey and convenience?

A. Well, I wouldn't say expediency and convenience. It was done in order to permit operation of an enterprise that was demanded by public interest.

Q. Well, was there any statute authorizing the operation of the ferry anyway? [85]

A. Well, it was considered part of the Highway Engineer's and the Road Board's functions to extend the highway system, and throughout the United States, as you know, you have ferries that are complimentary or supplementary to highways. You go to a certain point and you can either go by highway or you can go by ferry. In this particular case there was no alternative of connecting the highway system in the Interior except by ferry. You couldn't go from Juneau to Haines by road because you would have to cross Lynn Canal, and there was no bridge, so this was merely an extension of the highway system.

Q. Wouldn't the same thing apply to Ketchikan?

A. Yes; it would if it had been necessary.

Q. You have no ferry to Ketchikan?

(Testimony of Ernest Gruening.)

A. No. It was contemplated.

Q. As a matter of fact, it was——

Mr. Nesbett: What was the last answer?

A. There was no ferry to Ketchikan but it was contemplated.

Q. (By Mr. Faulkner): Now, Governor, you felt that it was an expedient and convenient way to handle the ferry funds in the way they were handled? A. Yes.

Q. And you know now you had no requirement for bond from the man who handled the fund, that you know of?

A. Well, that is an entirely different question. [86]

Q. Yes. I mean, you don't know of any, do you?

A. I do not know whether a bond was required.

Q. And you don't know whether there were some losses in the handling of those funds?

A. I do not.

Q. You don't know whether there were irregularities in the whole operation? A. I do not.

Mr. Faulkner: I think that is all.

Redirect Examination

By Mr. Kay:

Q. Governor, with regard to that, do you recall seeing a short three-page report of the Arthur Anderson Company with regard to the operation of the ferry? I don't know whether you have seen it or not. Do you recall seeing it?

A. I don't recall seeing it.

(Testimony of Ernest Gruening.)

Q. So then, if such a report exists, you simply do not know what its contents are?

A. I do not know and I do not recall seeing it.

Q. Was it ever reported to you by anyone or by any of the other members of the Board of Highway Commissioners that that fund was short?

A. No. [87]

Q. Or that there were any deficiencies or discrepancies in the financial statement of the fund?

A. No; it was never reported to me.

Q. You don't know whether the fund may have turned out short or long? A. That is correct.

Q. Mr. Faulkner asked you if you had been critical of the Empire on occasion in your radio or other public addresses, and, I believe, you replied that you had been. Is that correct?

A. On one or two occasions at the most.

Q. On any of those occasions, Governor, did you attack the, ever attack the motives or actions of the publishers of the Daily Empire in a slanderous or libelous manner in any way comparable with the front page of September 25, 1952, sir?

Mr. Faulkner: I object to that as——

A. Certainly not.

The Court: Just a moment.

Mr. Faulkner: ——calling for a conclusion.

The Court: Yes; the question is objectionable as calling for a conclusion and, I think, leading.

Mr. Kay: I think the witness can suggest a conclusion.

The Court: Well, you may ask whether he at-

(Testimony of Ernest Gruening.)

tacked [88] the motives—the first part of the question is proper—whether he attacked the motive or the honesty or integrity of the paper.

Mr. Kay: You are correct, Your Honor.

Q. (By Mr. Kay): Governor, did you at any time attack the integrity or the policy of the Alaska Daily Empire?

A. No. To the best of my recollection, in going back to Mr. Faulkner's query whether I had made several or more attacks on the Empire, I at this time can recall only one, and you may be able to remind me of others, but I can recall only one and that was in connection with this deleted statement, which had been issued by me and three other public officials, on the closing of the Alaska Juneau Mine which was for the purpose of calling attention to the fact that several employees were suddenly unemployed and that we wanted as far as possible to attract as much attention as we could to their state of unemployment so that they could get employment, and my criticism followed a warning to the editor at that time, Mr. Carter, that, if they did not print the statement in full, as he said they would not, and deleted certain sentences which would alter the meaning, that I would then be obliged to go on the air and read to the people of Juneau just what the original statement was so that people could find out what had been said and what had [89] been deleted, and that, I think, was the only extent of my criticism. It was really a factual report to the people. Now, you may recall other ex-

(Testimony of Ernest Gruening.)

amples of criticism, but I don't recall them, and they certainly were never on any basis of attack of the character of the Empire or its owners or anything of that kind. It was simply a report to the people when we felt we had been shut out of the opportunity of saying what we needed to say through the recognized medium of publicity, namely, the press.

Q. Would the same be true in general, Governor, concerning any other speeches which you may have made critical of the persons or institutions which Mr. Faulkner mentioned—the Alaska Steamship Company or the Salmon Industry?

A. Well, yes. I criticized the rate increases being imposed on the people of Alaska without hearings, without proper audit to ascertain whether those heavy burdens imposed on the people were necessary, and I criticized the Salmon Industry for some of its political interference in our legislation, its opposition to many measures which I considered desirable, and some of its other policies, particularly in relation to fish traps.

Q. With regard to these other matters which Mr. Faulkner mentioned, and I will mention particularly the Palmer Airport, for example, were you in any way publicly, so far as you can recall, critical of the Empire for its— [90] or did you deny the Empire at any time its right to freely criticize on a basis of honest disagreement of the paper on any subject, including the Palmer Airport?

A. Not that I can recall. I felt that the treat-

(Testimony of Ernest Gruening.)

ment accorded the Palmer Airport by the Empire was a very unfair one because all through was the implication, as in this case, of personal gain, corruption, whereas the only effort on the part of the officials in charge, who were guided by the C.A.A. officials, was to try to get something done quickly for the Territory of Alaska.

Q. Now, you mentioned C.A.A. officials. Are those officials of the Territory of Alaska, Governor, responsible in any way to the Governor or any of the Territorial officials?

A. No, they are not. They are Federal officials and not responsible to me, the Governor, or to anyone else.

Q. That is the Civil Aeronautics Administration? A. Civil Aeronautics Administration.

Q. Which is a branch of the Department of Commerce of the Federal Government?

A. That is correct.

Q. And those were the people with whom Territorial officials, the Aeronautics Board and others dealt in the financing of the Palmer Airport; is that correct?

A. That is correct. And they were the people who, presumably, had the expert knowledge on this subject. It was [91] a new field to us. We had never before engaged in airport construction with Federal matching.

Q. Do you have any recollection of the Empire publishing any report concerning the Union Bank,

(Testimony of Ernest Gruening.)

or of disagreeing with the Empire concerning anything that they may have published, if they did publish anything—I don't know that they did—in connection with this report concerning the Union Bank? A. Well, I really don't recall that.

Q. You don't?

A. No, I really don't recall that episode. I mean, of course, the papers have to be very careful what they publish about banks anyhow. There is always the risk of their causing a run on a bank and so forth.

(Whereupon, Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; the witness Ernest Gruening resumed the witness stand, and the Redirect Examination by Mr. Kay was continued as follows:)

Q. Governor, I should have asked you probably at some point—Mr. Roden has reminded me to ask you several times—for the benefit of some of the jury who may not be clear on the point, in connection with one of those exhibits—there was a letter from one Harold Ickes—who was Mr. Ickes at that time? [92]

A. He was the Secretary of the Interior and my superior, under the system that exists while we are a Territory.

Q. Now, Mr. Faulkner mentioned or asked you concerning an editorial appearing in the Anchorage Times following the publication of the Alaska Daily Empire of September 25, 1952, and he also

(Testimony of Ernest Gruening.)

asked you concerning the fact that friends had raised money for a car upon the expiration of your final term as Governor. Do you have—do you know how many persons or members of the public—do you have any way of estimating—who might have previously supported you, or at least have been neutral on the subject, changed their opinion as a result of the publication of September 25, 1952?

A. No. I have no way of calculating that.

Q. Then it is still your feeling that as a result of this publication your personal reputation and your reputation as a public official was damaged?

A. Well, I haven't any doubt about it.

Mr. Kay: I believe that is all.

Recross-Examination

By Mr. Faulkner:

Mr. Faulkner: If the Court please, there is one other question that I would like to ask the witness. I think I asked it, but I want to ask it now, having a little more [93] specific information, and he may be able to answer it and he may not, but it is really on cross-examination and not on recross.

The Court: Well, I presume no objection will be made on that score.

Q. (By Mr. Faulkner): Governor, I asked you if you had referred to the Palmer Airport Report of the Senate as slander, and I will now revise that and ask if you remember on August 17, 1950, that you gave a news item to the Empire in which they

(Testimony of Ernest Gruening.)

said that—in which you said that this reference of Butler to Stanley McCutcheon and others was slander. Do you recall that? I have the paper here but——

A. I don't recall it but I may have said it. I would say—if I may amplify what I want to say?

Q. Yes.

A. Knowing and being profoundly convinced that nobody engaged in that transaction stood to profit or profited by it personally, and that their only desire was to help the Territory, that any such accusation or implication was of a slanderous nature, and that was my objection to some of the editorials that were published at the time. Any searching examination would have revealed that no one stood to profit, no one made any benefit out of it, and, if they had, they certainly should have been [94] prosecuted; but that was the implication that was given in a lot of the newspaper publications, that someone somehow had benefited by it.

Q. Governor, just one more question. You had some differences, when you were Governor, with people and organizations and institutions who didn't agree with you on some policies, didn't you?

A. Well, I imagine that would happen.

Q. And you were quite insistent on having your way; you felt that your view was the right one?

A. Sometimes; and sometimes not.

Q. Mostly. Well, do you remember—I think this question is proper, but there is no hard feelings about it—do you remember one time when you set

(Testimony of Ernest Gruening.)

the F.B.I. after Ed Medley and Captain Lathrop and myself and some others there in Juneau because we didn't agree with you in legislation that you proposed?

A. I don't recall having anything to do with the F.B.I., but I do recall taking up with the United States Attorney the question of whether there had been violation of the lobbying statute in the Legislature, which specifically provided that lobbyists would have to register, and of course, as you know, there are a lot of people around Juneau at the time of Legislature who lobby but they don't register, and that was, I think, [95] probably——

Q. That is what the F.B.I. were doing; and you never did see the report, I suppose?

A. No. I know that Cap Lathrop told me very frankly that he had sent Jack Clauson down as a lobbyist, that he had paid Jack Clauson's expenses but the Canned Salmon Industry paid his costs in Juneau.

Mr. Kay: Are you through?

Mr. Faulkner: No.

Q. (By Mr. Faulkner): Well, you included some others in that, didn't you?

A. Well, I think I asked that the whole subject be looked into.

Q. I had forgotten about it until yesterday. It just occurred to me.

Mr. Faulkner: Yes, that is all.

(Testimony of Ernest Gruening.)

Redirect Examination

By Mr. Kay:

Q. Governor, was it your conception that this was one of your duties as Governor to see to the enforcement of the laws of the Territory?

A. Certainly; certainly it was.

Q. And call any violations or apparent violations——

A. Certainly it was my duty. In fact it is prescribed [96] somewhere in the statutes that the Governor should be responsible for the enforcement of the laws.

Q. Governor, you were queried at the commencement of your cross-examination for some time by Mr. Faulkner as to possible motives for the animosity or the change in attitude of the Empire between the time you came to Alaska, when they apparently welcomed you with open arms, and the attitude which they evidenced, according to your testimony, over a period of years during the latter years of your presence in Alaska, and I believe you offered to give your opinion several times as to the basis for that animosity, but, apparently, there was no desire to learn it; is that correct?

A. That is correct.

Q. I wonder if you would now state what your honest opinion is as to the point, the event, which led to the change in attitude, as far as you could detect, on the part of the publisher of the Empire?

(Testimony of Ernest Gruening.)

A. Well, I rather hesitate to open up this subject, but I think that the change in the Empire's attitude certainly was related to this circumstance, and that is—somewhere in the early forties shortly after Governor Troy had died, a check came into my office from the McMillan Company, which is a publishing house in New York, for royalties on the "Guide to Alaska," which was a book [97] published two years previously and the contract for which had been signed by my predecessor, Governor Troy, I think in July of '39, and, naturally, this raised the question as to where the other royalties had been, because, obviously, this check came into my office by accident because it was addressed to Governor Troy and it was opened there, and it appeared that these royalties had been collected and paid to the late John Troy and after his death to the Troy estate, which of course they should not have been.

It was an inadvertence on the part of somebody, because those funds belonged to the Federal Government and belonged to the Treasurer of the United States, and, naturally, it was my duty to report that, and, as a result of that, a demand was made on the Troy estate, I think on the attorney of the Troy estate, Mr. Faulkner, to refund this money which had been collected over several years amounting to some thousands of dollars. I think the thing was handled for the Government by United States Attorney Pat Gilmore who made a request on the Troy estate that these monies be refunded.

(Testimony of Ernest Gruening.)

Of course I had no alternative in the matter. It was my duty to report this. Those were funds belonging to the Federal Government which, inadvertently, had passed into private hands, and I believe they were then, [98] after action by the Department of Justice, refunded. And I think that had a considerable bearing on the increased hostility of the Empire to me.

Q. There was a change in attitude toward you?

A. There was a very definite change.

Q. From that point on.

Mr. Kay: I believe that is all.

Recross-Examination

By Mr. Faulkner:

Q. Governor, in investigating whether anybody appeared before the Legislature without registering, did you report to the F.B.I. anybody there who agreed with you? A. Who agreed with me?

Q. Yes. Do you recall?

A. I can't recall any lobbyists who agreed with me.

Q. You can't. Well, wasn't the place swarming with them? A. What?

Q. Wasn't the place swarming with them, dozens of them there?

A. I can't recall any lobbyists at that time that agreed with me. I thought they were all representing the Canned Salmon Industry and the mining industry and——

(Testimony of Ernest Gruening.)

Q. Well, you didn't look into that very closely. Now, Governor, about these checks from the McMillan Company, [99] when did you say you got a check?

A. Well, I can't remember the exact date, but I think it was somewhere around '42 or '43, in there.

Q. '44? A. It may be.

Q. Well, let me see is this a fact. When Governor Troy was Governor, he sponsored a book; isn't that true? A. Yes; in his official capacity.

Q. Which was put out by the W.P.A.?

A. Yes.

Q. And after he died a check came payable to him from McMillan Company, the publisher; is that right?

A. I think that is the way it was made out.

Q. Well, then the next year another check came to the Troy estate. Do you know anything about it?

A. I can only recall one——

Q. I mean—do you remember anything about it?

A. I can recall one check that came in which——

Q. Came where; from where?

A. Well, it came from McMillan Company.

Q. To whom?

A. It came to the Governor's Office.

Q. Well, who was it payable to?

A. It was payable to John Troy.

Q. What did you do with it? [100]

A. I turned it over to the Department, called their attention to it.

Q. When was that?

(Testimony of Ernest Gruening.)

A. Well, about this time.

Q. Then what did the Department do about it?

A. Well, I think they instituted proceedings. I think they communicated with you as the counsel for the Troy estate.

Q. Governor, aren't you very much mistaken about that? Didn't the Department begin to send you checks after the whole Troy matter had been cleared up? A. Oh, no.

Q. Well, then how did it happen that McMillan Company sent a check to John W. Troy the year he died?

A. I don't know. Perhaps they didn't know he had died.

Q. How did they happen to send a check the next year? A. I don't know.

Q. You don't know whether that is a fact or not?

A. No. I do know it is a fact that the money belonged to the Federal Government and that it was ultimately deposited in the Treasury.

Q. Yes. We concede that. Isn't it a fact though, Governor, to refresh your memory, that two checks came into the Troy estate to John W. Troy from McMillan, and an inquiry was made as to what these checks represented, and they said royalties on a book, and then later on the [101] office—I don't know what it was—that General Fleming was head of—I don't remember—wrote and said that this money should have gone to the Government because he had acted in an official capacity in arranging for these royalties, and we asked them for the contract,

(Testimony of Ernest Gruening.)

and they couldn't find it; they never did find it: they never did give it to us; but, when we found it at McMillan's, it was a contract made not with any official but with John W. Troy, and they had made it out wrong. Do you remember that? You said "inadvertently."

Q. Well, I think it was undoubtedly inadvertence somewhere.

Q. Yes; inadvertence. And the money was refunded to McMillan Company where it came from; and it was McMillan's duty to send it into the Government if they made out their contract right?

A. Well, I knew it was refunded after it had been called to their attention.

Q. And it didn't belong to the Troy estate, and nobody ever claimed it did, and it was sent back to McMillan, and they in turn after a year or two, when they got the proper contract, paid it over to the Government, and they withheld it and wouldn't pay it over until the Government agreed to change this contract from John W. Troy personally to the Governor of Alaska. Isn't that the way it happened? [102]

A. Well, I didn't follow it beyond that point.

Q. No.

A. I think former United States Attorney Gilmore could probably give the correct answer as to just what followed.

Q. Well, I don't think he knows much about it, excepting that they sent him a claim to file against the estate.

Mr. Faulkner: I think that is all.

Mr. Kay: I believe that is all.

The Court: That is all then.

(Witness excused.)

Mr. Kay: At this time, Your Honor, it is our intention to offer in evidence the deposition of John E. Small given at Anchorage, Alaska, on April 15, 1955, and, in order to do that in the manner which we think most proper, I am going to take the witness stand, as would Mr. Small, and read Mr. Small's responses, and Mr. Nesbett will read the questions to me. We will pause after each question to give Mr. Faulkner an opportunity to object if he cares to do so.

The Court: That is quite proper. If there be no objection, you may omit the formal parts. Is this deposition taken pursuant to stiplation or notice or which?

Mr. Faulkner: I think so.

Mr. Kay: Yes, it was.

The Court: You would not find it necessary to read the formal parts? [103]

Mr. Kay: The stipulation is attached to the original deposition.

Mr. Faulkner: Would not find it necessary to what?

The Court: You would not find it necessary to read the formal parts?

Mr. Faulkner: Oh, no; no.

The Court: You may omit that.

Mr. Kay: At this point I am acting as John

E. Small and no longer Wendell Kay; I am John Small in answering these questions for Mr. Nesbett.

Mr. Nesbett: This deposition was taken at the request of the plaintiffs in Anchorage, Alaska, and is the deposition of John E. Small, formerly an employee of the Empire Printing Company, the defendant in this case. Appearances as attorneys were Buell A. Nesbett, Attorney for Plaintiffs, and John E. Manders, of Attorneys for Defendant for the purpose of this deposition only. "John E. Small being first duly sworn upon oath, deposes as follows: By Mr. Nesbett:"

(Whereupon, the deposition of John E. Small was read as follows—questions by Mr. Nesbett and answers by Mr. Kay:)

(Reading.)

DEPOSITION OF JOHN E. SMALL

Q. What is your full name?

A. John E. Small.

Q. S-m-a-l-l? [104] A. Yes.

Q. And are you residing in Anchorage at the present time, Mr. Small? A. Yes, I am.

Q. And are you employed here? A. Yes.

Q. What is your occupation, sir?

A. I am a reporter for the Anchorage Times.

Q. I will ask you whether or not you were employed at one time by the Empire Printing Company, publishers of the Alaska Daily Empire?

A. Yes, I was.

(Deposition of John E. Small.)

Q. Can you state the dates during which you were or between which you were employed there?

A. From March 1, 1952, to approximately the end of February, 1953.

Q. And in what capacity were you employed by the Empire Printing Company, sir?

A. As the Police and Courthouse reporter.

Q. You are speaking——

A. It is the Police and Federal Building Reporter.

Q. And what were your duties in general with respect to that assignment, Mr. Small?

A. Well, I reported news as it developed in the police beats and in the Federal Building. [105]

Q. Were you employed on newspapers prior to coming to work for the Empire Printing Company?

A. Yes, I was.

Q. Can you state the dates and where you were employed roughly?

A. I worked for the Hastings Nebraska Tribune from March, 1943, to the end of December, 1946, as police reporter and later as wire editor. I worked for the Minot, North Dakota, News from the date after quitting the Tribune until January, 1948, as wire editor. I worked as editor of the Union Newspaper in Denver, Colorado; the Denver Police and Fire Journal as official newspaper for the Police Department and Fire Department from '48 until—well, into the summer of that same year. I operated a weekly newspaper in Eatenville, Washington. I don't know the date, but it was for a

(Deposition of John E. Small.)

period of approximately 6 months and during the illness of the owner, and I operated a weekly newspaper in Columbus, North Dakota. I don't recall the exact date on that either, but for a period of about 4 or 5 months, and from there I moved up to the Empire.

Q. Had you resided in Alaska for any period of time prior to going to work for the Empire?

A. I had been up here once before on a fishing boat and that is all. [106]

Q. Were you familiar with Alaskan politics at the time you went to work for the Empire?

A. No.

Q. I will ask you whether or not—strike that—when you worked for the Empire, Mr. Small, who was the managing editor?

A. Jack McFarland.

Q. And who was in over-all charge of the Empire?

A. Well, other than the acting charge was James Beard.

Q. And what was his title?

A. That was rather ambiguous around there. Nobody seemed to know. He actually held the position we ordinarily know of as business manager, but he also wrote editorials and generally oversaw the operation of the entire plant.

Q. Did Mrs. Helen Monsen hold any office or take any part in the operation of the Empire?

A. As publisher.

Q. I will ask you whether or not Mr. Beard,

(Deposition of John E. Small.)

after you had commenced to work for the Empire, gave you any expressions of Empire policy with respect to the Democratic administration as far as reporting and publishing of the Empire was concerned? A. Yes, he did.

Q. What were they?

A. Well, generally he told me over a period of time, [107] beginning with the Sunday that I arrived there, that there was a Gruening machine in existence in Alaska and that the Empire was opposed to him and was doing all within their power to drive the machine out of power and that part of my job would be to help them in this respect as a reporter; that any information I came across it was part of my duty to report that.

Q. I will ask you whether or not Helen Monsen, as publisher, gave you any similar information or instructions?

A. She never gave me any instructions, but on numerous occasions she did express antagonism against Governor Gruening and against what she called the Gruening machine.

Q. Now, I will ask you whether or not Mr. Beard or Mrs. Monsen ever expressed to you a desire to "get something" on Gruening or his administrative officials?

A. Helen has never asked me to do anything like that. Beard on several occasions, not specifically to me, but to the editorial staff in general has indicated we should do that.

(Deposition of John E. Small.)

Q. Now, as your period of residence in Alaska increased did you acquire some independent picture of the political situation?

A. Yes, I did. As I said, at the time I came there and during the tenure of my employ there I was constantly bombarded with statements to the effect that the Gruening [108] machine was full of graft, corruption and that we should do everything within our power to drive them out of power and, of course, I had no basis for knowing whether that was a true picture or not when I came there. As time went on and I covered my beats and talked to people with other points of view I learned that some people thought that the term "graft and corruption" could more properly be applied to the Empire and very frequently they suggested it could be applied to me as an employee of the Empire and I found considerable temperament, that attitude around town.

Q. Mr. Small, can you state from your experience in newspaper work whether or not the editorial and news reporting policy of the Empire, with respect to Gruening and his administration, was distorted?

A. My opinion was that it was about the most distorted news reporting, if you can use that term, that I have ever come across.

Q. Now, calling your attention to the evening of September 24, 1952, Mr. Small, I will ask you whether or not you had occasion to visit the newsroom of the Daily Alaska Empire?

(Deposition of John E. Small.)

A. Well, I don't recall the date offhand. I didn't have it in any of my notes, but if you are referring to the paper that involved—to the edition that is involved [109] in this liable action, yes.

Q. Then is it your testimony that you did have occasion to visit the Empire newsroom the evening before the publication of the edition involved in this action? A. Yes.

Q. Can you state about what time you went to the newsroom?

A. No, I can't except it was after dark.

Q. And who was in the newsroom when you went there? A. Jack Daum and Jim Beard.

Q. And what was Mr. Daum's position with the Empire, Mr. Small?

A. He was a reporter. He took over from me as Federal Building reporter.

Q. I will show you this newspaper and ask you if you can recognize it? A. Yes, I do.

Q. And describe it for the purpose of the record?

A. It is "The Daily Alaska Empire," September 25, 1952, edition that carries what we call the "scare head" stating that the Special Ferry Fund has been bared and containing such headlines as "Reeve Raps Graft, Corruption" and "Gruening, Metcalf, Roden Divert 'Chilkoot' Cash to Private Bank Account," and other similar scare heads.

Q. You were working at the Empire when that edition was published, weren't you? [110]

A. Yes, I was.

(Deposition of John E. Small.)

Q. Do you recognize that as the September 25th edition of the Empire?

A. I recognize it as an edition that was published at the time I worked there.

Q. It states September 25 in the heading, doesn't it? A. Yes.

Mr. Nesbett: This copy will be attached to the original of the deposition and marked Exhibit A.

Q. (By Mr. Nesbett): Now, I will ask you whether or not you saw the news makeup represented by the front page of this edition dated September 25, on the evening you visited the newsroom?

A. Yes, I did. I saw what we call a page proof of it.

Q. You call it what? A. Page proof.

Q. What is a page proof, Mr. Small?

A. Well, that is a proof of the type that is run off for the purpose of checking the type for errors.

Q. Then is it true that a page proof would be as easily read as this?

A. It would be practically exactly like that.

Q. As Exhibit A that we have here?

A. Yes.

Q. Did you have any discussion—what did you do when you [111] entered the room?

A. I don't recall exactly. I was coming in, as was my custom, to do work that I hadn't gotten done earlier in the day and I think, if I recall, that I was at my typewriter for awhile and shortly after that I noticed Beard and Daum reading this page proof over at the managing editor's desk and I walked

(Deposition of John E. Small.)

over to see what they were discussing and what they were doing.

Q. I will ask you whether or not you had any discussion with Mr. Beard concerning this page proof? A. Yes, I did.

Q. What was that discussion?

A. Well, immediately after looking at it Beard turned to me and said, "What do you think of this," or words to that effect, not a direct quote, and after glancing over it I told him that it looked like he had a libelous makeup.

Q. Now, when Mr. Beard said, "What do you think of this," did he say anything else prior to your reading it?

A. Well, he made several comments and the one I recall, of course, is "We have got the S.O.B. where we want him," or something to that effect.

Q. Did you make any immediate reply to that comment?

A. I don't think I made any immediate reply. I read the proof over pretty thoroughly, they were working on it continually during that time and I read both the lead [112] story and that front page editorial and I told them that I thought both of them were libelous in themselves.

Q. Did Mr. Beard make any statement in connection with your remark?

A. He probably did, but I don't recall exactly any statement he made now, except that he generally —well, discounted any suggestions I had as to libelhood. And I might also say that Daum did the same

(Deposition of John E. Small.)

thing. Daum and I had a brief argument, he stated there was no libel in it; and, I recall I pointed out to Beard that he had in the makeup heads such as that, "Reeve Raps Graft, Corruption" alongside heads about Special Ferry Fund being discovered or bared and that he was using color words which had connotations of graft and corruption and that the placement of his information in his lead story would indicate to a reader that corruption was involved or graft and specifically in the editorial there was reference to Oscar Olson which attempted to point out a correlation between the 2 cases. I told him that was definitely libelous and they told me that it was not.

Q. Did you notice anything unusual in Mr. Beard's tone of voice when he made the remark "I guess we have got the S.O.B. where we want him" or words to that effect?

A. Yes, Beard was a very demonstrative sort of person and there was obvious satisfaction, you might say even glee, [113] in his manner and in his tone of voice when he made the statement. He was very elated that night.

Q. Mr. Small, do you know of any rivalry that existed between Mr. Beard and Governor Gruening with respect to Mr. Beard's political ambitions?

A. Other than the obvious ambition to be in politically with the party that ousted Gruening, the only definite thing I know of is a statement he made one time that it looked like he might be on the way to the Governor's chair.

(Deposition of John E. Small.)

Q. That who might be on the way to the Governor's chair?

A. That Beard might be on the way. That occurred quite some time after this thing, after the election in fact, and Elmer Friend, who was then acting as managing editor, and Beard and I were riding in a cab——

Mr. Manders: Just a minute. This was all subsequent to the publication of the article, this last——

A. Yes. He, Beard and I were riding in a cab and he made the statement at that time he might be on the way to the Governor's chair or it looked like he might be. That is the only reference he ever made to me personally of ambitions to political office.

Q. Did you state previously that Mr. McFarland was managing editor when you went to work for the Empire? A. Yes, he was.

Q. I will ask you whether or not Mr. McFarland was employed [114] as managing editor, in any capacity at the Empire on September 25, 1952?

A. No, he wasn't.

Q. Do you know whether or not Mr. McFarland quit the Empire or was fired?

A. That was a moot point. James Beard, I have heard him state—in fact James Beard told me the day that McFarland, to my knowledge quit, that he had fired him, but his severance with the Empire occurred as a result of an argument over a news story. I don't recall the story which they wanted

(Deposition of John E. Small.)

him to publish and he as managing editor refused to do so.

Q. When you say they wanted him to publish, whom do you have in mind?

A. Helen Munson and Jim Beard.

Mr. Manders: Has this story that you refer to have anything to do with the basis of this libelous suit?

Mr. Nesbett: I can answer, John. It hasn't, but it is strictly admissible as indicating the previous attitude. You see we have alleged in our Complaint a "campaign," it is called, to discredit by distortion and so forth.

Q. (By Mr. Nesbett): When you say they wanted McFarland to publish the story who do you have in mind?

A. James Beard and Helen Munson. [115]

Q. Do you know the nature of the story that Mr. McFarland refused to publish?

A. No, I don't know specifically and I don't even know generally except that practically all the arguments—in fact, I would say all of the arguments that occurred between McFarland and Beard, and usually that included Helen, concerned editorial policy that referred to a story about either Governor Gruening or some member of the Gruening administration, and I am quite sure that that story did have something to do with that. I am saying that I know that. I heard McFarland arguing and telling those people in the office, the words were very loud and I could hear them from Helen's of-

(Deposition of John E. Small.)

fice into the newsroom, McFarland told them they could have their job and their paper and he was going, and he subsequently went.

Q. Do you recall overhearing any conversation concerning this publication of September 25 on the day of the publication in the Empire offices?

A. Yes, I do.

Q. And was that conversation between Helen Munson, Beard and——

A. Originally the conversation was between Helen Munson and Jim Beard. That occurred in Helen's office.

Q. And were you there? [116]

A. I walked in the office for some business purpose, I don't recall what it was, and they were discussing this at that time.

Q. What was that discussion?

A. It referred, of course, to this paper and whether or not the Empire was in for a libel suit and Helen apparently had already been told by enough people that it impressed her because she was very worried that it was a libelous edition and Beard was telling her that they had nothing to far——

(Reading suspended.)

Mr. Kay: Apparently meaning "fear."

(Reading resumed.)

—and that if they just stuck firm that there was nothing anybody could prove. He also told Helen

(Deposition of John E. Small.)

that if—the thing about this is that during that conversation there was a telephone call and the voice was later identified as that of the Empire Attorney, Faulkner, and the man wanted to know "Who in the hell's idea it was to put that out," or something to that effect.

Q. Did you hear that voice say words to that effect? A. Yes, I did—very loud.

Q. To whom were the words spoken?

A. Helen answered the telephone.

Q. Did Helen say anything further to this attorney over the [117] phone?

A. There was conversation and Helen asked him whether or not it was libelous and he told her it was.

Q. Did he use exactly those words?

A. No, that is not a direct quote. I just recall he informed her that they had a possible libel suit on their hands.

Q. Just to refresh your memory, and I am looking at my notes, did the attorney say or did Helen Munson quote him as having said, "It was libelous as hell?"

Mr. Manders: Just a moment. I don't mind you asking the question, but I do object to the leading of the witness.

Mr. Nesbett: It was a matter of refreshing his memory from notes here. Well, you can object to it at the time of the trial.

Q. Does that——

A. Well, he possibly said that sometime, but I

(Deposition of John E. Small.)

don't recall exactly that except that it was very strongly worded. It left me with the impression that Faulkner felt that the Empire had committed a libel.

Q. Mr. Small, do you have any interest in the outcome of this suit in any fashion?

A. No, I don't.

Q. I will ask you whether or not you overheard any conversation between Beard and others concerning this publication [118] of September 25?

A. Will you repeat that, please?

(Thereupon, the last question was read by the reporter.)

A. Yes, I know I did. I don't recall any exact words, but I recall overhearing Daum and Beard talking about it.

Q. I will ask you whether or not you overheard Beard discussing this publication with Ed Coffey and in your presence? A. This case?

Q. This publication? A. No, I did not.

Q. Well, I will ask you whether or not you overheard any conversation at all between Beard and Ed Coffey subsequent to this publication and concerning it?

A. Not subsequent to it, no, and not in reference to this publication.

Q. Did you overhear any conversation between Beard and Ed Coffey concerning the editorial policy and news reporting policy of the Empire as to the Gruening administration?

A. I was a target of some conversation at one

(Deposition of John E. Small.)

time between Coffey—or directed at me by Coffey and Jim Beard about a month or so after I started working for the Empire.

Q. And what was the nature of that target directed towards you?

A. It was explained—— [119]

Mr. Manders: Just a minute. He said one month after he started to work for the Empire which would put him in about the month of April, 1952, and this publication didn't take place until 1953, is that right?

Mr. Nesbett: September of '52.

Mr. Manders: Some 6 months or 5 months later and it is objected to as being too remote to connect this editorial with such conversation.

Q. (By Mr. Nesbett): What was that conversation, Mr. Small?

A. It was an explanation, forceful explanation, I might say, by both men of the political situation in Alaska and I was informed that there were 2 sides and that the Empire was on one and the Gruening machine was on the other and it concluded with the remark that I recall today because it prejudiced me against Ed Coffey to the effect that a smart boy would know which side of his bread is buttered, or words to that effect. In other words, if I played ball with the right people I would get somewhere and if I didn't I would get nowhere. That was the effect.

Q. Now, Mr. Small, do you recall overhearing any conversation between Mr. Beard and another

(Deposition of John E. Small.)

person in Mr. Beard's apartment after this publication of September 25?

(Reading suspended.)

Mr. Nesbett: They mean '52 no doubt. [120]

(Reading resumed.)

A. Yes, I do.

Q. State the circumstances and the nature of that conversation?

A. Well, I don't recall the time. I recall it was quite late at night and I don't even recall the business I had for going up, but I was heading up for another apartment and as I passed Jim Beard's apartment I heard loud voices and I stopped and listened. I overheard some conversation that didn't mean much to me except they were discussing this.

Q. This what? A. This publication.

Q. Of September 25?

A. Yes. This was several weeks after this was published and the voices were loud and angry and the statement that I recall clearly was Jim Beard's threat to some—whoever was in the apartment that if he mentioned or published or made public some letter that Beard would kill him.

Q. Did you hear anything further on that occasion?

A. I probably did, but I don't recall it now.

Q. Are you certain that their argument or heated discussion was concerning this publication of September 25, however?

(Deposition of John E. Small.)

A. Well, I am certain part of it concerned that because [121] that was mentioned, but I don't know whether it all concerned that.

Q. Now, can you state whether or not Governor Gruening's reputation was injured by reason of this publication of September 25?

A. I would say it was not permanently, perhaps, but it was, at least to my knowledge, it was hurt for the period aimed at by the Empire and that was the election period coming up in November.

Q. Can you state whether or not the reputation of Henry Roden was damaged by reason of this publication of September 25?

A. Well, Henry Roden appeared, from the information I gathered in my time in Juneau, to have a very high reputation in the Territory and especially in Juneau and most of the conversations I heard were directed at me expressed sorrow that Henry had gotten himself mixed up in a thing like this.

Q. Can you state whether or not the reputation of Frank Metcalf was damaged by reason of this publication of September 25?

A. I can only state that it is my opinion that it was.

Mr. Nesbett: That is all.

By Mr. Manders:

(Reading suspended.)

Mr. Nesbett: Do you want to read that?

Mr. Faulkner: It doesn't matter, unless you want me to.

(Deposition of John E. Small.)

(Reading resumed.)

Q. Mr. Small, you say you are now employed by the Anchorage Times? A. Yes, I am.

Q. And how long have you been employed by them? A. Since March 1st, 1953.

Q. 1953? A. Yes.

Q. Was that right after you left the Empire?

A. Yes, that was the day after.

Q. You mentioned a number of papers for whom you worked? A. Yes.

Q. When you left those papers did you leave of your own accord in each instance?

A. Yes, I did.

Q. And then you published papers of your own?

A. Not of my own. I have published papers as editor. I have published 3 weekly newspapers, that is, 3 periodicals for other owners.

Q. And when you left those papers what was the reason?

A. In one instance a union newspaper; I quit partially [123] because I wasn't in a type of position that was paying me enough money; and for the other reason that my wife and I wanted to move to the West Coast. The other two were taken as part-time jobs—not part-time jobs, but as temporary jobs and in one instance to do a favor for a friend, that was at Eatenville, and in the other instance to help out a man who asked me to go out and do some trouble shooting for him. Incidentally,

(Deposition of John E. Small.)

I have letters of reference from all my former employers.

Q. Let me ask you this, Mr. Small: You have testified that you were not familiar with Alaskan politics at the time you came up here? A. Yes.

Q. Now, on the papers you had previously worked on or managed isn't it a fact that most newspapers take a side one way or the other in political matters?

A. That depends on what you mean. Are you talking about politics generally or on specific issues?

Q. Different machines, let's say, as they are commonly known. One group opposed to another.

A. Not always, no.

Q. Did you work on newspapers that took one side as opposed to another?

A. If I may I will answer that this way: I have worked on a paper that was Republican, which favored Republican [124] policies in general.

Q. Papers and the policies of those papers do those things, do they not?

A. Some newspapers do, some don't.

Q. This Jack McFarland you mentioned, what does he do now?

A. I understand he is teaching school in Kake or one of those little villages down in Southeast Alaska.

Q. Is this the Jack McFarland you have stated here who left the Empire and then did he go with another newspaper?

(Deposition of John E. Small.)

A. He didn't go with another newspaper. He established the Juneau Independent.

Q. Is he with that Juneau Independent now?

A. No, he isn't.

Q. And how long was he with them, do you know?

A. I don't recall exactly. He had been gone for a month or so, I suppose, when I first learned of it by reading an Independent up here.

Q. Do you know who he established that with?

A. Yes, Irvin Jensen and a printer whose name I can't recall right now.

Q. Was George Sundborg in that newspaper?

A. Not at that time, no.

Q. He is now?

A. He, as I understand it, now is the publisher and principal stockholder, but I don't know that for a fact. [125]

Q. Did I understand you correctly to state that Helen took no part in the publication?

A. I didn't say she took no part. I said—you are talking about this publication?

Q. Yes, prior to its publication.

A. I have no knowledge of her taking any part in it except in that Helen was present there and Helen generally tended pretty close to her business in matters of publication, especially where they referred to the so-called Gruening Machine.

Q. Well, was there anything strange in a newspaper taking sides politically?

A. I would say no, there is nothing strange

(Deposition of John E. Small.)

about a newspaper taking sides politically, but there are extremes beyond which ethical nwespapers don't go.

Q. I see. I understood you to state that Helen never gave instructions in regard to this matter, but expressed distaste for the Gruening Machine, is that correct?

A. Helen has never given me any instructions to do anything, but her attitude was expressed on many occasions in conversations with me and in conversations I overheard that the Gruening Machine could do no right and that——

Q. Do you know the reason why she would have any animosity, if you want to call it such, or feelings toward the Gruening Machine? [126]

A. I have her reasons, reasons expressed by other people and reasons I arrived at myself.

Q. Was that by reason of her father having been the former Governor?

A. That is what it appeared to me and from what I had heard people express around town. The opinions they expressed was—the primary reason for her antagonism towards the Governor was that she considered he had ousted her father from the Governor's chair. In fairness to Helen I will have to say she vigorously denied that and said she opposed the Gruening Machine because she considered it unethical.

Q. The evening you speak of being in the newsroom, what was your occasion for being there?

A. It was common practice of mine to return

(Deposition of John E. Small.)

to work at night and complete work on stories that I hadn't finished during the day.

Q. By the way, have you discussed this case with anyone prior to the taking of your deposition here? A. Yes, I have.

Q. And with whom?

A. I have discussed it with my wife and I have talked to the attorney here about the fact I was going to—you are including any period from the time of that publication on—I also discussed it with Governor Gruening and at [127] that time he asked me what my attitude was and I told him I thought it was an underhanded blow and that I would be willing to testify in a libel suit. That was after it had been filed.

Q. After what?

A. After the libel suit had been filed I had a conversation with Governor Gruening which I told him that.

Q. That was after he filed the libel suit?

A. Yes.

Q. Did he call upon you or did you call upon him?

A. Neither actually. We met during the course of my coverage of the Federal Building one day. In other words, I went into his office on a matter of business and we discussed this publication and the libel suit.

Q. Was that conversation reported by you to anyone in the Empire as to the fact that you would testify in his behalf?

(Deposition of John E. Small.)

A. Well, it probably was discussed with somebody, but if you are intimating or asking whether or not I discussed it with Jim Beard or Helen Munson the answer is no.

Q. Did Mr. McFarland quit the Empire or was he dismissed?

A. To my knowledge he quit. I overheard him tell Jim Beard and Helen Munson that he was through and he made that threat several times before on similar arguments but hadn't carried them out, this time he did, however. That [128] afternoon Jim Beard, who apparently didn't know I had been in the newsroom at that time, told me he fired McFarland.

Q. You made reference to a telephone conversation between Helen Munson and a voice on the telephone? A. Yes.

Q. And do you know positively whose voice that was?

A. If you mean did I recognize the voice, no, but Helen Munson identified the voice as being that of her attorney, Faulkner.

Q. And how did she identify that to you?

A. She didn't to me. She turned to Jim Beard after the conversation and told him that Faulkner thought it was a libelous publication.

Q. Faulkner thought it was a libelous publication, but that could have been by someone else.

A. You mean she was saying somebody else had told her? No, the indication was she had just talked

(Deposition of John E. Small.)

to Faulkner and Faulkner was informing her of this.

Q. Now, you have no interest in the outcome of this?

A. Well, I answered no to that before. If you mean pecuniary interest the answer is no.

Q. No, I didn't mean a monetary interest in any sense of the word. Have you an interest in the outcome of this litigation as to which way you would like to see it terminated? [129]

A. I will put it this way: I have an interest in seeing that justice is done and if this is a libelous publication then I think it should be made known. If it isn't, why, that is up to the court.

Q. Let me ask you this, Mr. Small: You have been a reporter here on the Anchorage Times since March 1, 1953? A. Yes.

Q. And would you say that that newspaper impartially reports the news politically in favor or against one of the other parties as we know them today? A. The Times?

Q. Yes.

A. I would say generally that it does, yes.

Q. Would you not say that it leans towards the Gruening Machine? A. Its stories?

Q. Yes.

A. Not in content, no, I wouldn't say they do.

Q. Would you say it leans in favor of the Republican party? A. No, I would not.

Q. And what was this discussion you claimed to have had with Ed Coffey?

(Deposition of John E. Small.)

A. This was a discussion in which Ed Coffey and Jim Beard were involved. I don't recall the exact date except it was not too long after I came to work for the Empire and [130] it was during the course of a party in which a large number of people were involved. We had left Helen Munson's house to go over to Mike's place across the channel for dinner. There was a woman in the cab and they stopped at one of the hotels to let her get something and while she was—during that interval Beard and Coffey were attempting to impress on me the importance of being on the right side and the political wars that were in existence at that time down there.

Q. That was merely a matter of shop talk of persuasion, wasn't it?

A. I certainly didn't consider it such. It affected me to the extent that while—since that time I have known of certain things that Ed Coffey has done that I approved of, but I have been so prejudiced against him from that conversation that I haven't been able to regard Ed in a purely impersonal light since then.

Q. What Ed Coffey are you talking about?

A. The Ed Coffey who is an insurance agent here in Anchorage and who, at that time at least, was a member of the—I don't know the title—this tourist——

Q. Alaska Visitors Association? A. Yes.

Q. It is the Ed Coffey that lives here in Anchorage then? A. Yes. [131]

Q. And former Senator from this division?

(Deposition of John E. Small.)

A. Yes.

Q. And it was that one conversation that prejudiced you against Mr. Coffey? A. Yes, it did.

Q. Do you mean by that that you shouldn't have loyalty to the person by whom you are employed?

A. That you should not?

Q. Or that you should?

A. I don't mean that. I don't quite understand that question.

Q. That is what I am trying to find out. Just what do you mean? Did he mean that you should be loyal to the person who is employing you?

A. Do I mean what?

Q. You said Mr. Coffey said that you better go along——

A. Mr. Coffey was not in this. Incidentally, it was not a two-sided conversation between Mr. Coffey and myself. It included Jim Beard and there was no mention of loyalties as such. I was being advised that for my own welfare I should play along with the right people and I would get somewhere in Alaska. If I didn't I would be gone.

Q. I see. And this evening that you refer to in your testimony of a conversation at the apartment of Jim Beard, you know that you heard loud voices but you don't know [132] who they were?

A. I know one was Jim Beard. I didn't recognize the other.

Q. You don't know anyone else? A. Yes.

Q. Were you angry at the Empire when you

(Deposition of John E. Small.)

were there? When I say the Empire I am speaking of the publisher of this newspaper.

A. If you are speaking of personal anger the answer is no. I have never been angry at Helen Munson. I am not angry at her today. I like Helen Munson as a person. In fact, it is unfortunate she is being used as a tool by people with interests that I don't think are parallel to hers and I only regret that Helen has become involved in this sort of thing. If you mean am I angry at the policies that were practiced by the Empire the answer is, yes, I was. I disagreed with them and——

Q. Were you opposed to the policies from the beginning? A. From the beginning, yes.

Q. But you continued on? A. I did.

Q. Until the time you left?

A. That is right.

Q. Now, did you leave of your own accord?

A. Yes, I did.

Q. And what was your reason for leaving? [133]

A. My primary reason was just what I have stated—that I disagreed with them. The final trigger was the fact I found employment elsewhere and my wife had been pregnant the preceding period I had been there, finally had given birth to our daughter and I no longer felt the financial strain that I had been under before.

Q. Let me ask you this, Mr. Small: Did you leave because you weren't given certain assignments or given a more responsible position?

A. No, I did not.

(Deposition of John E. Small.)

Q. You did not?

A. I did not. In reference to that I might say here that Jim Beard at one time promised me the position of managing editor with the definite indication that it would be mine provided I played ball.

(Reading suspended.)

The Court: Pardon me. We have gone a bit overtime thinking that possibly we could conclude this deposition. Is there much more of it?

Mr. Kay: There is still another ten or twelve pages.

Mr. Nesbett: Still eight, nine, ten pages.

The Court: I hesitate to impose on the jury so long. We are fifteen minutes now overtime. It would seem that we could continue that in the morning, so we will recess the case until 10:00 o'clock tomorrow morning. [134]

(Whereupon, the jury was duly admonished, and the trial was adjourned until 10:00 o'clock a.m., November 16, 1955, reconvening as per adjournment, with all parties present as heretofore and the jury all present in the box; whereupon, the trial proceeded as follows:)

The Court: We will resume the trial at this time in the Empire Printing Company cases. You may resume then the reading of the deposition of John E. Small.

Mr. Nesbett: This was the deposition of John E. Small taken by the plaintiffs in Anchorage,

(Deposition of John E. Small.)

Small being the former employee of the Empire and presently employed by the Anchorage Times. The questions I was reading at adjournment yesterday were the questions put to Mr. Small by attorney John Manders of Anchorage, representing the defendant Empire Printing Corporation. They were not my questions.

Mr. Faulkner: What page?

Mr. Nesbett: We stopped at Page 30 at Line 16.

Mr. Faulkner: Thank you.

The Court: That is on cross-examination, in other words.

Mr. Nesbett: This is on cross-examination. Mr. Faulkner can be considered as having asked these questions. Mr. Kay is representing Mr. Small in making these responses, in reading the answers.

(Reading resumed.) [135]

Q. Now, I don't know if it's so important, but you made some allusion or reference to the fact that Jim Beard might be sitting in the Governor's chair. That was, as I remember, after this publication.

A. Considerably after, I don't know the exact date, but I can date it by saying it was at the time of that ALCOA boom.

Q. At the time of the ALCOA entrance into Alaska if he had gone into the area there—around Haines or Skagway? A. Yes.

Q. Well, I guess Beard's ambitions were no different than another hundred thousand in the Territory were they to be Governor?

(Deposition of John E. Small.)

A. No, I wouldn't say they were different in that respect.

Q. As a matter of fact, I imagine you heard it from a lot of people that were going to be Governor?

A. No, I didn't. That is the only man I ever heard make the statement that he might be Governor some day.

Q. The only man that made a statement as such?

A. Yes.

Q. Did you hear of other people who thought they would be Governor?

A. Yes, I have heard they had that ambition.

Q. Plenty of them. Now the only persons I understood you discussed this matter with were Mrs. Small, your wife, [136] Mr. Nesbett and Governor Gruening?

A. Well, no—did you say discussed my testifying?

Q. Yes, this case?

A. Oh, I think that there are probably others—Jack McFarland, I don't recall definitely discussing it with him, but he was a friend of mine and undoubtedly I did at some time or another tell him I was going to testify if it ever came to trial. And, incidentally, Irvin Jensen, who is another member of the Independent who quit at the same time McFarland did for the same reason, I probably discussed it with him.

Q. Now, let me ask you this: Have you any

(Deposition of John E. Small.)

intentions of leaving your present residence here in Anchorage when this case comes to trial?

A. Right now?

Q. As it stands at the present day?

A. Right now my plans for the future are a little indefinite. My wife and I had been hoping to get a year's leave of absence and attend the University of Mexico, however, correspondence that we received just recently indicates that those plans won't develop and if they don't then we have no plans for leaving.

Q. In other words, it is your intention to be right here in the Territory? A. Yes.

Q. Did I understand you to say the University of Mexico? [137] A. Yes.

Q. Not New Mexico? A. No. Mexico.

Q. By the way how old are you, Mr. Small?

A. 39.

Q. Let me ask you this question: Isn't it generally the run of the mill in newspaper offices for reporters, editors and others to get together?

A. Yes, it is.

Q. And comment over the fact that they have gotten a scoop, what they are trying to do, either going to solve a murder or they are going to do this, that and the other thing—I mean, there is usually a feeling of working on a problem, isn't there?

A. No, not necessarily. When you get a scoop you will probably discuss it over coffee conversations or bare conversations with your other members of the editorial staff.

(Deposition of John E. Small.)

Q. Now, just what conversation did you have with Helen Munson? A. I beg your pardon?

Q. Just what conversation did you have with Helen Munson just shortly before or after this publication that has been referred to as the publication of September 25, 1952?

A. Well, I don't know what you are [138] getting at.

Q. What were your conversation with her?

A. I have had many, many conversations with Helen.

Q. I don't mean about automobile accidents down the street, but in relation to this publication?

A. None prior to the publication. After the publication I told Helen that Jim Beard had gotten her into a lot of trouble; that that was a libelous publication and it was at that time, I believe, or just a few minutes after then that Jim Beard said they could get around that by writing a retraction in the following day's publication, which they did, stating that it was not the intention of the previous day's publication to imply graft or corruption. I told Helen that I thought that wouldn't do much good. Helen was very much upset at that time and Helen was angry with me.

Q. She was angry with you?

A. Yes, she was. Apparently she thought—I will say that in any other matters besides Governor Gruening Helen Munson was one of the nicest persons I have known. When I attempted and I had attempted during my time at the Empire, to discuss that with her you just couldn't talk to her about

(Deposition of John E. Small.)

that one subject. When you attempted to do so it just led to anger on her part, as it did this time.

Q. Did she ever go into any details with you, or generally, why her feelings towards Governor Gruening was such as [139] it was?

A. Oh, yes. She has told me on various occasions about the Gruening Machine; the graft and corruption which she said was perpetrated by that machine, by Governor Gruening. She also brought up the fact that she is aware of this feeling that her antipathy arises from the feeling that Gruening caused her father to be ousted from the Governor's chair and she has brought that up and said that it isn't so.

Q. And the Helen you are referring to in every instance here is Helen Munson? A. Yes.

Q. And there is no question that there was rivalry at all times between the Empire and Gruening?

A. No question whatsoever. That was the first thing I learned the day I got there.

Q. Since the time you came to Alaska—you testified you knew nothing of the political situation or Alaskan politics? A. No, I didn't.

Q. Since that time have you found out what they are? A. Yes, I think I have.

Q. And is the same situation existing today as was existent during the time you were, as to politics now, with the Empire? [140]

A. Well, I don't know exactly what you mean by

(Deposition of John E. Small.)

that. Governor Gruening was subsequently defeated. Metcalf was——

Q. Well, excepting when you say "defeated" you mean not reappointed? A. Yes.

Q. Do you find today there is a Gruening Machine and an Anti-Gruening Machine?

A. I never found there was a Gruening Machine. During my time there I found there was a Governor Gruening who was administrator of the Territory and that he had people working for him and people who were in favor of him and his policies. I never found any evidence that he had a machine, political machine as I have been given to understand such exists and to my knowledge none exists today. There is a Democratic faction and a Republican faction. There are a couple of them, I guess, in the Territory.

Q. At least there are enough factions?

A. Yes, that is true.

Mr. Manders: That is all.

(Reading suspended.)

Mr. Nesbett: Questioning now——

(Reading resumed.)

Q. (By Mr. Nesbett): Mr. Small, when you said, in response to one of Mr. [141] Manders' questions, that you opposed the policies of the Empire but continued to work there for some time

(Deposition of John E. Small.)

what did you mean by the words "opposed policies"?

A. I meant that I considered not the Empire's antagonism towards Gruening as being wrong, but the editorial practices they used in attempts to unset Gruening as being very unethical.

Q. Do you mean, in other words, the editorial comments and news reporting was distorted in an unethical manner in order to reflect upon Gruening and his administrative officials?

A. Yes, editorials were distorted, facts, stories distorted and deliberately so to my knowledge.

Q. Now, when you stated, also in response to one of Mr. Manders' questions, that Jim Beard had once told you that he would make you managing editor if you played ball did you understand him to mean by "play ball" that you should continue to carry out that editorial policy of the Empire? A. Yes.

Mr. Manders: Just one minute. I didn't make the statement about Jim Beard asking you to play ball. I think that was your answer in response to a question I asked you. A. Yes.

Mr. Nesbett: That was just the way I quoted it I [142] think.

(Thereupon, the reporter read question line 17, page 36.)

Mr. Nesbett: I believe that is all.

Mr. Manders: Just a couple of questions.

(Reading suspended.)

(Deposition of John E. Small.)

Mr. Nesbett: Now, these are questions by Mr. Manders on behalf of the defendant.

(Reading resumed.)

Q. (By Mr. Manders): What is your feeling toward the Empire? I am speaking of the newspaper now.

A. Toward the newspaper? It is my feeling it is a poor newspaper as a journalistic enterprise.

Q. And as to the people who operate it?

A. The people who operate it? I only know two people who operate it now personally, Helen Munson and I think Helen Munson, as I have said, is a very fine person with a fixation that is unfortunate, as I have stated before. I know the man who has the title, at least, of managing editor down there, Bob Kedrick, who is, in my opinion, not doing the job of newspapering that I expected him to do down there. I have heard reports by the grapevine that that isn't at all his fault that he is not allowed to run the newspaper. He is a former employee of the [143] News.

Q. My recollection is that you said that you quit of your own accord—the Empire? A. Yes.

Q. And was your reason for quitting there the fact that you had been disappointed in your work with them?

A. No, the reason I quit was that, as I stated, the primary reason was that I disagreed with Empire policies, I learned that those policies were not going to be abated or were not going to cease; that

(Deposition of John E. Small.)

Jim Beard appeared at that time to be taking even a stronger hold than he had had before on the operation of the plant and I had asked Robert Atwood, publisher of the Times, for employment here and he told me, yes, I could come up here and go to work. So my only reason for staying with the Empire as long as I did was the fear of finding myself without funds or employment up here while I had a pregnant wife. Those fears had been dissipated and I had no further reason for staying there.

Q. Then your reason for whatever feeling you have against the Empire, whether it is one of animosity, would be by reason of the fact that you didn't like their policies, is that it?

A. I object to the use of "animosity." I object to the Empire today on the same ground I did before, on the [144] ground that they operate an unethical newspaper.

Q. That the paper itself is an unethical newspaper?

A. The unethical operation. The journalistic practices don't conform to my ideals of good impartial journalistic reporting.

Q. The real basis then is a difference in opinion as to what you believe and what the policy is?

A. That is right. They apparently believe it is all right to distort news. I believe that it isn't.

Q. And were there any differences by reason of the personnel there?

A. Only indirectly in that at one time shortly

(Deposition of John E. Small.)

before I quit I had been given the impression that Jim Beard was on the way out and I had reason to believe then that Jack Daum, who was a good newspaper man, was taking over and I had no objection to working under him. I thought possibly the practices that had been in effect there would cease and shortly before I quit I was informed that this was not going to be so and at that time Robert Atwood happened to be in town so I asked him for a job and was given a job.

Q. The editor of the Anchorage Times was in Juneau at that time?

A. He stopped in Juneau on his way somewhere from the states.

Q. You asked him? [145]

A. Yes, I met him at the hotel and asked him.

Q. To place you on his paper and he agreed to it? A. Yes.

Q. And at that time he knew you were still with the Empire?

A. I was still with the Empire, yes.

Mr. Manders: I think that is all.

Mr. Nesbett: That is all.

(Reading suspended.)

Mr. Nesbett: And in the back of the deposition, ladies and gentlemen, is a correction which Mr. Small later requested to have inserted and made a part of the deposition, so he went to the reporter's office, the reporter who took this in shorthand and transcribed it, and dictated the following: "Anchorage,

Alaska, April 25, 1955. To Whom It May Concern:

"I desire to correct testimony given in my deposition on April 15, 1955, regarding causes Henry Roden, Plaintiff, vs. Empire Printing Company, Defendant; Ernest Gruening, Plaintiff, vs. Empire Printing Company, Defendant; and Frank A. Metcalf, Plaintiff, vs. Empire Printing Company, Defendant; Nos. 6725-A, 6726-A and 6727-A, respectively, to be changed as follows:

"Page 39 of the deposition, regarding how and when I was hired by Robert Atwood, in my testimony I answered the [146] question as to whether or not he hired me there and then and I answered, "Yes," which is not the truth. He told me he would have to discuss it with his managing editor and probably a week or two after that I called him up by long distance telephone and asked him again and at that time he told me to come on up." Signed, "John Small."

(Reading concluded.)

Your Honor, at this time I should like to publish the deposition of Neil Moore taken at my request in Juneau in Mr. Faulkner's office, the original of which is in the Court's file.

The Court: Very well. You wish that to be read in the same manner as the other deposition?

Mr. Nesbett: If your Honor please, yes.

The Court: That is the proper procedure and may be done.

Mr. Nesbett: Deposition of Neil F. Moore taken

on October 10, 1955, at Juneau, Alaska. Appearances: Buell A. Nesbett, Attorney for Plaintiffs; H. L. Faulkner, of Attorneys for Defendant. "Neil F. Moore being first duly sworn upon oath deposes as follows: By Mr. Nesbett:"

(Whereupon, the deposition of Neil F. Moore was read as follows—questions by Mr. Nesbett and answers by Mr. Kay:)

(Reading.)

DEPOSITION OF NEIL MOORE

Q. Your name is Neil Moore, is it not?

A. Neil F. Moore. [147]

Q. And up until very recently you were Auditor of the Territory of Alaska, were you not?

A. That is right.

Q. And you were Auditor on September 25, 1952, were you not, Mr. Moore? A. Yes.

Q. And for some time prior to that date?

A. Since December 15, I think, of 1950.

Q. Now, Mr. Moore, you are familiar in general with the front page of the Daily Alaska Empire which was printed on September 25, 1952—the basis of these suits—are you not?

A. I remember that.

Q. Concerning the ferry fund and so forth?

A. Yes.

Q. Mr. Moore, did you know that the special ferry fund, so-called, existed prior to September 25, 1952?

A. I don't remember the exact dates. It was

(Deposition of Neil F. Moore.)

called to my attention by one of the crew members and we got in touch at that time with the Attorney General's office, but I don't remember what date it was.

Q. Was that crew member one Steve Homer?

A. I guess that is his name. Steve Homer Larsson.

Mr. Faulkner: Steve Larsson Homer.

Q. As Auditor, Mr. Moore, you knew that the Territory had [148] purchased the Chilkoot Ferry, did you not?

A. Oh, I was well aware of that; yes.

In fact, you authorized the payment of the purchase price, did you not?

A. When they bought the ferry, yes; the boat itself.

Q. And that was something over a year prior to September 25, 1952, wasn't it?

A. I don't remember just what the dates are.

Q. It was a considerable time prior to September 25 of 1952?

A. It could have been a year, all right.

Q. And you knew also that the Territory, through the three members of this Board, was operating the ferry, did you not?

A. Yes. It is part of the road extension, as it was claimed.

Q. Yes. As a matter of fact, the voucher payments for the salaries and expenses of the operation of the ferry passed through your office and were subject to your approval, were they not?

(Deposition of Neil F. Moore.)

A. They were supposed to.

Q. Well, as a matter of fact, they did, did they not?

A. Well, the way I remember it, not all of them did.

Q. Now, I will ask you whether or not the vouchers that did pass through your office and approved by you and paid, were not vouchers for payment of the expenses out of the Motor Fuel Tax Fund? [149]

A. That was where they were supposed to have been paid from.

Q. Now, you were well aware that vouchers for the expense of operating this ferry which were being paid out of the Motor Fuel Tax Fund did not pass through your office for a number of months prior to September 25 of 1952, were you not?

A. I was aware of it?

Q. Yes.

A. I don't recall. I think maybe it came to my mind now and then, but the reasons for holding them up, paying them some other way, were not brought to my attention. I didn't know what was going on.

Q. Well, as Auditor, when the vouchers for the payment of the expenses of the ferry failed to come through your office, didn't you inquire as to how the expenses were being met? A. No.

Q. You made no effort whatsoever to learn that fact?

A. It wasn't my business to. We had expenses of

(Deposition of Neil F. Moore.)

the Territory come in maybe five or six years after the expenditure was entered into.

Q. Ordinarily during the time the Territory owned and operated the Chilkoot Ferry, the vouchers had passed through your office regularly every month, had they not, to pay the crew and so [150] on?

A. As I recall, I think some of them did, that is right, and if they did, I wouldn't have been too particularly concerned about other bills because I wouldn't know if they had any on tap or not.

Q. Didn't you, after such vouchers discontinued to come through your office, make any investigation as to why they were not coming through?

A. I don't think they were discontinued. The regular salary vouchers, as I remember, came through every month, if I remember rightly. This particular check that was brought to me was not a salary check in the regular sense of the word. It was an overtime payment check. I think that was what it was, and there were two things wrong with it: One was that it did not go through the Auditor's office, and the other was that the Territory did not recognize overtime payments. They still don't—overtime, that is.

Q. Was that check presented to you for payment?

A. No, it was just given to me and I was asked what about it, and I asked where he got it and he

(Deposition of Neil F. Moore.)

just said it was for overtime. I said where did he get it and he said that was the way he was paid, and I said you can't be paid that way, so he asked me what to do with it and I said to leave it with me, he did, and I took it to the Attorney General's office, and what happened to it after that I don't recall. That is what started it, anyway. [151]

Q. Is it your testimony that that was the first knowledge you had of the existence of this fund?

A. That was the first knowledge I had that money was being paid from this fund.

Q. Was that the first knowledge you had that this fund existed?

A. As I recall, the money collected by the various agents of the Chilkoot was put into the bank account, which was perfectly all right, according to the Attorney General, but when they started paying expenses out of it, that is where the wrong arose. You see, even right today the Department of Taxation, for example, will deposit money into a bank in their own name and then at the end of the month they will get a cashier's check and transmit the money to the Treasurer or to their head office.

Q. Well, then, how long prior to Mr. Homer's visit to your office were you aware that this fund existed?

A. That I do not know. I did finally find out about it, but there was nothing we could do about it so long as money was not spent; assuming they are Territorial expenses, that is. As soon as we

(Deposition of Neil F. Moore.)

found that out, we took it immediately to the Attorney General. I didn't fiddle around with it.

Q. As a matter of fact, you knew the fund existed for many months prior to September 25 of '52, didn't you? [152]

A. Well, I could have, so long as money was just put there and turned over to the Treasurer, but I don't remember if they actually turned any money over to the Treasurer or not. But so long as they didn't spend it, it was supposedly Territorial money and would be eventually turned over to the Treasurer.

Q. Did you know how the expenses and wages in connection with the operation of the ferry were being paid?

A. As you pointed out to me, I was paying some of the expenses, the regular salary expenses and I don't recall what other expenses were paid, but as long as some were being paid, I was in no position to know if all of them were being paid or not.

Q. At a time long prior to September 25 of '52 all such vouchers ceased to come through your office, did they not? A. I don't remember.

Q. You don't remember?

A. I don't remember.

Q. Did you know that a special meeting had been held by Gruening, Metcalf and Roden, with the Attorney General, in connection with establishing this fund?

A. That I do not know either, but I will say this, that if there was such a meeting held, I don't

(Deposition of Neil F. Moore.)

think any authorization was given to that Board to spend money out of it, because it was his opinion to me that it could not be [153] done.

Mr. Faulkner: Whose opinion?

A. The Attorney General's. He was the one who helped me when I brought it to their attention.

Q. You don't know that at that meeting that I referred to the Attorney General was present and approved the establishment of the fund?

A. No; it was never called to my attention.

Q. Now, why did Mr. Steve Homer bring this check which is reproduced on the front page of the Alaska Empire on September 25 to your office, do you know?

A. I don't know. I don't know why he brought it to me, but he did. I didn't take the check. I asked him if he would leave it and he said yes, and that is how I got my hands on it.

Q. Did you give him any money for the check?

A. No.

Q. You just asked him to leave it there, is that correct? A. Yes.

Q. What did you do then?

A. I took it up to the Attorney General's office.

Q. Did you call Governor Gruening or Henry Roden or Frank Metcalf about it? A. No.

Q. Why didn't you? [154]

A. Because I didn't think they should be concerned with it. I took it to the Attorney General and then if he wanted to talk to them, fine and dandy. I don't know, maybe he did.

(Deposition of Neil F. Moore.)

Q. Ordinarily in a case like that, if you thought disbursements were not being properly made, wouldn't you take it up with the officials concerned first?

A. In that case, no, because it was not a payment according to law and it should have gone right directly to the legal officer, the Attorney General, and that is where it went.

Q. How did you know from looking at the check that it was a payment not according to law?

A. It wasn't a Territorial warrant, to begin with, and it was signed by—I don't know what his title was—skipper of the Chilkoot Ferry, Mr. Steve Larsson Homer.

Mr. Faulkner: It was signed by Bob Coughlin.

A. That is right, the purser, but Mr. Homer brought it to me and he said this is for overtime pay on the ferry. Well, the ferry wasn't chartered out or under contract to anyone—the Territory was actually running the ferry.

Q. Why did Mr. Homer bring the check to you?

A. I don't know. I don't know why he brought it to me. He could have just as well taken it to the Attorney General himself. [155]

Q. Did you call the Behrends Bank and ask them what the Chilkoot Ferry Fund was all about?

A. I don't know whether I called them right then or waited until the Attorney General and I talked it over, but we did go down, that is, the Attorney General and I.

(Deposition of Neil F. Moore.)

Q. And you never at any time called any of the three members of the Board, the plaintiffs in these cases? A. I never did no.

Q. As a matter of fact, you were not on speaking terms with most of them, were you?

A. I had to be. We were on the same boards.

Q. Well, ordinarily, wouldn't you have contacted them and said, "What's cooking here"?

A. No. I didn't do it in the other case.

Q. Which other case?

A. The Treasurer's defalcation. I went directly to the Attorney General.

Q. Well, now, didn't you also go to the Daily Alaska Empire on that day or the following day?

A. Not that I recall.

Q. Well, you did go there in connection with this matter, didn't you?

A. I think they came to me, if I recall correctly.

Q. Don't you recall going to their office with this check? A. To their office? [156]

Q. Yes.

A. No. I didn't take the check down there.

Q. Did you call them about the check to visit you in your office?

A. I don't think I even had the check when they came to talk to me about the story. I think I turned it directly over to the Attorney General. I don't recall, though.

Q. Then you could have not remembered at this date is that your testimony?

(Deposition of Neil F. Moore.)

A. No; I think I took it right straight up to the Attorney General's office.

Q. And with whom did you talk there?

A. John Dimond, the Assistant Attorney General.

Q. Was Mr. Williams in?

A. He wasn't even in town, if I remember rightly.

Q. And did you cause this Chilkoot Ferry Fund in the Behrends Bank to be frozen?

A. The Assistant Attorney General, John Dimond, and I both did; we both went down together.

Q. Did John Dimond actually take part in discussion with the bank and tell them to freeze the fund, that it was illegal?

A. We were both there and we just pointed out to them that these were Territorial expenses being paid in an illegal manner, and that was it. I don't know whether we told [157] them to freeze it or not, but they automatically would.

Q. Now, if I told you that John Dimond denies having anything to do with freezing the fund, would you still testify as you just have?

A. I don't recall whether we told the bank to freeze it or not. We just told them it was illegal to make payments from it.

Q. You told them that, didn't you?

A. We both did, I think.

Q. Well, you knew that if the fund was frozen that there would be no money to pay the employees or expenses of the ferry?

(Deposition of Neil F. Moore.)

A. It would come out of the Gas Tax money. That is where all of it should have been paid from.

Q. Didn't you call any of the members of that Board and say "there is an incorrect procedure here and let's get it straightened out"?

A. No.

Q. Why didn't you?

A. I took it to the Attorney General.

Q. In the interests of harmony and permitting the Territory to smoothly operate the ferry, you should have gone to one of the three to straighten it out peacefully, shouldn't you?

A. The matter, as I recall, was thrashed out before and the [158] device used was the same device used by the former Treasurer. There was a special account and illegal payments from it, and they were just as well aware of it as I was.

Q. This Chilkoot Ferry Fund check was signed by Coughlin, wasn't it? A. Yes.

Q. And the members of the Highway Board or the operators of the ferry had nothing to do with the checking account, that is, to check on it, did they?

A. I don't imagine that Bobby Coughlin would have ever signed the checks without authority. He must have had some authority some place.

Q. I am not questioning Coughlin's authority. I am saying that he was the one in whose trust the account was made; isn't that correct?

A. As I understand, he deposited the money in it and he also drew the checks on it, but in both cases I don't see him doing that without any au-

(Deposition of Neil F. Moore.)

thority from some source, some place. He could have just as well deposited it in the Territorial Treasury and submitted the vouchers for the payment of his crew and his expenses in regular order.

Q. From the Motor Fuel Tax Fund?

A. From the Motor Fuel Tax Fund, yes, just like some of them were. [159]

Q. Isn't it a fact, Mr. Moore, that you were bitterly opposed to Gruening and most of the officials serving under him at that time?

A. You mean personally or in a business way?

Q. Both.

A. Well, I imagine there were one or two that I wasn't compatible with, but we all had our differences in the way we did things, but I didn't have any animosity towards Henry Roden, and I don't think I had any at the time toward Frank Metcalf. I did with Gruening because of the way that things had happened before. I didn't have any love for Gruening and he had none for me.

Q. As a matter of fact, you were very unfriendly toward Metcalf practically from the time you both took office, weren't you?

A. I don't know where you got that information, but that isn't true.

Q. Didn't your animosity toward Frank Metcalf commence on or about the day you called him and asked him to come down to visit you in your office and he said to come up to his office if you wanted to visit; do you recall that?

(Deposition of Neil F. Moore.)

A. No, I don't recall that. Do you know of any of the conversation that took place?

Q. I am asking you if you do.

A. Well, if you could tell me a little bit——[160]

Q. Well, I told you of the incident. Do you recall it?

A. When I called him to come up and see me?

Q. Yes.

A. And he said come down and see him——

Q. Or words to that effect.

A. No, I don't remember that. The only time I was ever called down to his office—no, if I did, I don't recall when it was.

Q. Didn't that feeling you have for Metcalf deepen after the incident in August of 1951 when you disapproved a $5.00 expense item that he had incurred in connection with Governor Dewey's visit here?

A. No, I don't think so. I don't remember, but I don't think so.

Q. You recall that incident?

A. Yes, I remember it.

Q. When you told him that Democrats had no business paying expenses of Republicans?

A. That's right, or words to that effect—particularly when it was not Territorial business.

Mr. Nesbett: I think that is all.

By Mr. Faulkner:

(Reading suspended.)

Mr. Nesbett: These questions then were pro-

(Deposition of Neil F. Moore.)

pounded by Mr. Faulkner on cross-examination of Mr. Neil Moore, the [161] Auditor.

(Reading resumed.)

Q. Neil, when you went to the Behrends Bank to tell them that this ferry fund set up there was illegal or was wrong, you say Mr. Dimond went with you, the Assistant Attorney General?

A. Yes. It was a highly technical thing, and I wanted him with me down there. In fact, I asked him to go with me.

Q. Did Mr. Dimond say that you were wrong about it or did he make any objection to what you were doing at the bank when you went down there?

A. No, no; if I recall rightly, I asked him if it was right or wrong and he said it was wrong. But I think we both had two different things in mind. I had the deposit of the money in mind there, and he may have had the thought in mind that the withdrawal of the money to pay Territorial expenses was wrong.

Q. Now, under the law you had an interest in this matter as Auditor?

A. For instance, as soon as any of the money was being spent for Territorial expenses, yes. As far as the deposit was concerned, no; that was the Treasurer's.

Q. That proportion was supposed to be turned over to the Treasurer as the law requires?

A. Yes. [162]

(Deposition of Neil F. Moore.)

Q. As Auditor you, by law, were required to scrutinize all payments of all vouchers?

A. Yes.

Q. That was your interest in this matter?

A. That's right.

Q. When this special bank account was closed, do you remember how much was in it?

A. No, I don't. It seems to me it was two or three thousand dollars, but I don't recall.

Q. You don't recall. You don't recall whether it was two, three or ten thousand?

A. It seems to me it wasn't above the ten thousand mark, but I don't remember.

Q. All right, if you don't remember, that is all right.

Now, let's go back to this check of Steve Homer's. Is it a fact that Steve brought this check to you after that bank account had been closed and that the reason he brought it to you was that he could not cash it?

A. No, he brought it to me—I don't know why he brought it to me, as a matter of fact, but the Assistant Attorney General and I went down there and the account, as I recall it, was still active.

Q. Didn't Steve Homer bring the check to you afterward because he couldn't get it cashed? If you remember—if you don't remember, why just say so. [163]

A. Now that you mention those things, it seems like there was something there, why he brought it to me.

(Deposition of Neil F. Moore.)

Q. Yes, otherwise he would just take it up there and cash it. Isn't it a fact that he took it there and couldn't cash it, and brought it to you to see what was the matter? A. I don't remember.

Q. He would remember that. A. Yes.

Q. Now, Neil, when this article appeared in the Empire, or before it appeared, did the reporter come to you for this story? He quotes you in the paper as telling about the account.

A. The story came out after I had written to the Attorney General about it.

Q. And your letters to the Attorney General were published in the same issue? A. Yes.

Q. In that same issue there was an interview with Roden and Metcalf, the plaintiffs, about the setting up of this fund and the payments out of the fund. Do you recall that?

A. Was it in the Empire?

Q. Yes. A. No, I don't recall that. [164]

Q. Do you recall any remark that Frank Metcalf made that it was a bookkeeping trick to avoid going through the regular procedure of the Auditor's office?

A. That was told me to. That was what was told to me; yes.

Q. To avoid going through the Auditor's office?

A. Yes.

Q. Now, Neil do you know—the law requires, does it not, that the accounts of the Territory be audited by a firm of public accountants once each year?

(Deposition of Neil F. Moore.)

A. At that time it was at least once each biennium.

Q. Biennium? A. I think it was.

Q. Now, at the end of the biennium concerned, was there a firm of auditors employed to audit the Territory's accounts?

A. Yes; Arthur Anderson and Company.

Q. Arthur Anderson and Company; of Seattle?

A. Yes.

Q. They made and filed a report including a report of this fund? A. Yes.

Q. And did they find there a shortage in the fund? A. Yes.

Q. Something over three hundred dollars?

A. I think it was three hundred dollars even. [165]

Q. Three hundred and a few cents. A. Oh.

Mr. Faulkner: If it is agreeable with you, Mr. Nesbett, I would like a recess now until eight o'clock. There are only a few more questions I would like to ask at that time.

Mr. Nesbett: All right.

(Mr. Moore being previously sworn, continued his testimony at 8:00 o'clock p.m.)

(Reading suspended.)

Mr. Nesbett: Resuming questioning by Mr. Faulkner on cross-examination of Neil Moore.

(Reading resumed.)

(Deposition of Neil F. Moore.)

Q. (By Mr. Faulkner): Neil, this copy of the Empire of September 25—have you looked over that since we adjourned at five o'clock?

A. Yes.

Q. September 25, 1952. Now, in the articles regarding the ferry, where they give the facts here about the setting up of the account, did you give those facts to Jack Daum, who wrote the article?

A. I don't remember if it was Jack Daum or not, but if it were, yes, I did. He came in and asked various questions and he was answered.

Q. And he was the reporter for the [166] Empire? A. Yes.

Q. And this copy of the letter that you wrote to the Attorney General, did you give him that too, that was published in the paper?

A. He asked for it and he was given a copy of it, or he copied it, I don't know which.

Q. Now, in connection with the ferry and the payments from the so-called ferry account, were there some payments made to aliens on that boat?

A. Well, that is what I learned, and that was one of the things that was wrong, that you have to be a citizen to work for the Territory.

Q. Yes.

A. And any payments to an alien, well, that was entirely wrong, illegal payment.

Q. Illegal payment. Now, with reference to the Oscar Olson account, you refer in this letter to the Attorney General to the Oscar Olson case. In what

(Deposition of Neil F. Moore.)

respect was that similar—you say it was similar—did Olson set up a separate account?

A. It was a parallel case in that in both cases there was a separate account set up and money withdrawn from that account.

Q. Yes; and now we refer to the Anderson report, which you talked about here before five o'clock, where they audited [167] the Territorial accounts and in the portion of the report on the ferry account, you say they showed a shortage of three hundred dollars and some cents?

A. Yes, that's right.

Q. What period did that report cover?

A. Well, the audit by Arthur Anderson and Company was for the biennium ending December 31, 1952.

Q. That would be the years 1951 and '52?

A. That's right.

Q. Up to the end of December of 1952?

A. That's right.

Mr. Faulkner: I think that's all.

(Reading suspended.)

Mr. Nesbett: Questions——

(Reading resumed.)

Q. (By Mr. Nesbett): What facts do you refer to, Mr. Moore, when you say you gave the facts to Mr. Daum?

A. The facts regarding the handling of the Chilkoot Ferry money, the Territorial money.

(Deposition of Neil F. Moore.)

Q. Which article would that be reported in, the feature article on the right-hand side?

A. Yes.

Q. ——entitled "Gruening, Metcalf, Roden Divert 'Chilkoot' Cash to Private Bank Account"?

A. Yes. That deal—when they came up to me they asked me what I had found out and what we had done, and those are the facts we gave them, that is, I gave them.

Q. Did you give them these facts, namely the leader here entitled "Gruening, Metcalf, Roden Divert 'Chilkoot' Cash to Private Bank Account"?

A. No, I didn't give them those exact words. The wording that I used is more or less in the letter that is published there too.

Q. Did you give them the wording farther on down in that article in the second sentence of the subheading, entitled "Illegal Payments," the sentence which says, referring to the fund, "Into it have gone the receipts from the operation of the ferry, which was purchased by the Territory in May, 1951, and there have been thousands of dollars of illegal recepits and disbursements recorded in the fund to date, Moore charged."

A. I don't think I said "illegal receipts," but it was illegal payments.

Q. The receipts were not illegal, in your opinion, were they?

A. No, the receipts they deposited according to the Attorney General, but according to the Attorney General's opinion, the receipts could not be

(Deposition of Neil F. Moore.)

deposited in the bank but in the General Fund only, so if I did say that, I had in mind the Attorney General's opinion, which I pointed out [169] in the letter, too.

Q. But it isn't your opinion and you didn't say, as far as you recall—— A. To the reporter?

Q. That there have been thousands of dollars of illegal receipts?

A. No, it couldn't be termed that way, because the receipts were perfectly legal. It was the deposit of the money that was illegal.

Q. Well, then, you didn't tell them how to write this feature article on the right-hand side of the page, did you? You gave them certain facts——

Mr. Faukner: I object to that. That isn't what I asked him. I asked him if he gave them the facts. I don't claim that he wrote the article or used the language that is in the article.

Mr. Nesbett: I know that, Bert, but I am just bringing it out.

Mr. Faulkner: Yes.

(Reading suspended.)

Mr. Nesbett: Questioning resumed by Mr. Nesbett.

(Reading resumed.)

Q. You didn't have anything to do with the drafting or the setup of this article at all, did you, Mr. Moore?

A. No, I didn't have anything to do with the

(Deposition of Neil F. Moore.)

writing of the [170] story; no. I just gave them the information that they asked for and that was it.

Q. And no proof of the story was given to you for checking before they published the same, was it?

A. No, I don't recall that. They may have called me up occasionally and verified certain facts, to see if they had them correct or not.

Q. They called you quite often, didn't they?

A. Yes, in fact up until I resigned here a couple of weeks ago they were up every day to the office. They visit all the offices, all the reporters.

Q. Now is it your testimony now that monies were paid out of this fund to aliens?

A. Some of the money was; yes.

Q. Do you know who those aliens were?

A. Their names? No, I don't.

Mr. Faulkner: I think we can furnish that. I have another witness who will be at the trial.

Q. Was Steve Homer an alien?

A. No. Do you mean foreign-born, not a naturalized citizen?

Q. Well, you used the word "alien." Under your definition, would he be an alien? A. No.

Q. At the time Steve Homer brought that check into you, you knew of no other payments out of that fund to other [171] people, did you?

A. Not until that check was brought to my attention.

Q. Well, as a matter of fact, you didn't know any payments had been made out of that fund to

(Deposition of Neil F. Moore.)

aliens at the time you rushed up to the Attorney General's office, did you?

A. At that time—I don't know whether it was before or after. I don't recall now.

Q. Well, Steve Homer's check was the first check brought to your attention drawn on this Chilkoot Ferry Fund, wasn't it?

A. That's what I recall; yes.

Q. Well, if any previous checks had been drawn to your attention, you would remember them, wouldn't you?

A. Yes, I would have done the same thing as I did now.

Q. All right. Then Steve Homer's check, we can assume, is the first check that came to your attention, is that right?

A. We assume it; yes.

Q. And up to that time naturally you didn't know any funds had been paid out to aliens, would you?

A. No, it wasn't until afterwards that I heard about it.

Q. That wasn't your reason then for going to the Attorney General in the first place, was it?

A. No; in the first place——

Q. Now, with respect to Oscar Olson, what type account did [172] he have that was, as you term, a separate account?

A. It was money established in a separate account in the bank which was not authorized by any law.

(Deposition of Neil F. Moore.)

Q. Which bank? A. Behrends Bank.

Q. What was the name of the account?

A. I don't know if it was in his name or the Treasurer's name, but money was diverted into that account and he drew checks on it, personal checks on it.

Q. Well, actually, as a matter of fact, it was in the Treasurer's name, wasn't it?

A. I don't remember how he had it set up in the bank.

Q. Well, if you can't remember what type account he had, how can you say it was a parallel case?

A. Well, when the Auditors found it, it showed it.

Q. Showed what?

A. Showed that he had a special account in the bank.

Q. What was the special account?

A. It was a device that he was using.

Q. What was the name of the account? How did he use it?

A. He used it for any purpose he saw fit.

Q. Well, what title did he give these checks to allow the bank to determine which one to charge?

A. I think some were just charged—written—Oscar G. Olson, if I remember rightly. As a matter of fact, some were [173] not signed by him but by his help, "Oscar G. Olson by so and so."

Q. Then the account had no particular title, is that right? A. I don't know.

(Deposition of Neil F. Moore.)

Q. Well, now, where do you get this wording, "parallel case"? What are you trying to do, justify in your testimony the statement in the Empire that the case closely parallels that of Oscar Olson and so on?

A. No. I wrote that in my letter to the Attorney General so that he would know exactly what we had discovered, that it was another device similar to the one that the former Treasurer had used, that they had a fund which no one could touch except the Treasurer, no one could draw a check on it except the Treasurer. The same way with the other one. The Chilkoot Ferry Fund was the same identical thing. Nobody could draw money out of that except who was told to.

Q. Except who was told to—what do you mean?

A. Well in this case apparently it was Bobby Coughlin who was told that he could draw checks on that fund.

Q. Well, as a matter of fact, Bobby Coughlin was the only one authorized to draw any checks on it, wasn't he?

A. That's what I said. He must have had authority to do so.

Q. But he was the only one authorized to draw checks on that fund? [174]

A. I don't know if he was or wasn't.

Q. You don't know?

A. If he was the only one who was authorized to draw checks on it.

(Deposition of Neil F. Moore.)

Q. Well, didn't you look into the fund to determine whether you were going to close it or not?

A. We closed it because they were paying Territorial expenses illegally.

Q. How can you say that it paralleled the Oscar Olson situation if you didn't even look into it to see who was authorized to draw checks on the fund?

A. That is another problem, but checks were being drawn on this particular fund, by Bobby Coughlin in this case. In the other case Oscar Olson was drawing funds out of a special fund. So you have two special funds—one was handled by the Treasurer and one by the Road Board, and one is being drawn on by the Treasurer to pay everything and anything that he saw fit. The same thing on the other side—it is a parallel case.

Q. No check was ever drawn on this fund by Metcalf, Roden or Gruening, was it?

A. I don't know.

Q. Well, didn't you look to see?

A. I only saw the one check.

Q. Well, then, how can you say it was a parallel case? [175]

A. It was a device. The device was similar in both respects, in both cases. I told the Attorney General that here was a case similar to the one that had just been cleaned up.

Q. If the checks had been drawn on the Motor Fuel Tax earmarked Fund, you would have approved the vouchers, wouldn't you, for operating the Chilkoot Ferry?

(Deposition of Neil F. Moore.)

A. Yes, if they were legal.

Q. The checks drawn on this fund were used to pay the same expenses, were they not?

A. Yes, but there is a law that says they couldn't do it.

Q. Well, then, how can you call this special device similar to Olson's?

A. Because it by-passed the channels that were set up by the Legislature for the payment of Territorial expenses, the same way on the other side.

Q. Well, what grounds did you have for stating that this paralleled the Olson case in imputing fraud? A. Who had control over it?

Q. Did you know? A. No, I didn't know.

Q. But you immediately went out and said it closely paralleled the——

A. That's right; it did.

Q. You would have done almost anything to bring the Gruening group into disrepute, wouldn't you have? [176]

A. I didn't have to do anything. They did it all by themselves.

Q. You did all this, though, to do it, didn't you?

A. Well, I called a halt to it; yes. I didn't do it by myself. I had the Attorney General with me.

Q. Now, you say the Attorney General approved it, did he? A. What?

Q. John Dimond, you say, the Assistant Attorney General—— A. To stop it?

Q. Yes. A. He was right with me.

Q. Did he do it? A. What?

(Deposition of Neil F. Moore.)

Q. Did he do it? A. Did he do what?

Q. Did he cause the funds to be frozen and stop payment——

A. He was with me when we talked to the bank. That stopped the funds from being spent.

Q. But you were the one who told the bank to close the fund or freeze it, weren't you?

A. I was with John Dimond. I don't know if it was him or me or both of us.

Q. You don't know?

A. I don't recall. That is over three years ago.

Q. Well, now, didn't you testify just a bit previous here [177] that the device was similar to that of the Olson situation because in the Oscar Olson case only he could draw on the fund?

A. The parallel is this: that here were two bank deposits, one made by the Treasurer and one made by the Board——

Q. Will you please answer that question?

A. All right. It was money that should have been put in the General Fund and was not put into the General Fund in both cases; it was put into a special bank account. Checks were drawn on it in both cases. There is your parallel. It doesn't matter who drew the checks. They were drawn illegally, deposits made illegally, because the deposited money should have gone into the funds that were set up by the Legislature and they weren't, and the money was not deposited to the fund in both cases.

Q. But I thought you just testified previously that the deposit was legal?

(Deposition of Neil F. Moore.)

A. At the time they said it was, but then I got an opinion.

Q. But you didn't have the opinion at the time you talked to Mr. Daum when this article was printed, did you? A. Oh, yes I did.

Q. The opinion of the Attorney General?

A. That the money from the Chilkoot Ferry was supposed to go to the General Fund.

Q. Well, what would that be? Information that would cause [178] you to believe that it was an illegal deposit?

A. Well, it goes like this: if the money had been deposited into this special bank account and held for any particular reason that the Road Board thought was necessary to hold it for a short period of time, the money should then have been taken from that account and turned over to the Treasurer to go into the General Fund. It could not have gone into the Gas Tax Fund under that particular opinion, but it never was transmitted until this thing happened.

Q. Transmitted—you mean to the General Fund? A. Yes.

Q. Until this thing happened?

A. Until it came out in the paper.

Q. Well, the funds were frozen then, weren't they?

A. That's right, they were frozen and they stayed frozen for I have forgotten how long, but eventually the Attorney General and the Treasurer, I think—somebody—got together and they worked

(Deposition of Neil F. Moore.)

out a system of how they could get the money transmitted into the General Fund, and I think that is where it went, what was left of it.

Q. Well, now, will you go back and answer my question. I am putting it to you for the third time. Didn't you testify here previously this evening that in the Olson situation the Territorial Treasurer, or Olson, was the [179] only one who could draw monies out of the fund?

A. He fixed it that way; yes.

Q. How did he fix it that way?

A. I don't know what he told the bank.

Q. What sort of an account was it?

A. What?

Q. What sort of an account was it?

A. It was just a special fund and all forms of taxes were dumped into it.

Q. Did it have a label?

A. It might have been Oscar Olson, or it might have been Oscar Olson, Territorial Treasurer, I don't know.

Q. Is it your testimony now then that he was the only one who could draw upon the fund?

A. Well, apparently so, because the checks that anyone else wrote on his behalf were signed by that person for Oscar G. Olson, or "Oscar G. Olson by so and so."

Q. Well, then others could draw on the fund, couldn't they, by writing a check, signing Oscar Olson and their name, "by"?

A. They were his employees.

(Deposition of Neil F. Moore.)

Q. All right. How was that similar or where does that situation closely parallel this one, where Robert Coughlin is the only one authorized to draw on the fund?

A. But was Robert Coughlin the only one that was authorized? [180]

Q. Didn't you check the fund?

A. I don't know who was authorized. I didn't see the minutes.

Q. Well, then, how can you speak indiscriminately and say to Mr. Daum that the case closely paralleled the Oscar Olson case without any investigation?

A. I am saying the parallel is this: there were two——

Q. That isn't the question. Please answer the question.

A. Regardless of who drew the checks or who deposited them, you had two accounts in the bank not authorized. Money is dumped into it; withdrawals from both of these accounts. There is the parallel. Now who did it or didn't do it—that has nothing to do with what I was telling the Attorney General. I was pointing out to him that here is another account similar to the one that had already been cleared up, with withdrawals similar to the other one. There is the parallel.

Q. But you knew at that time that Oscar Olson had admitted his guilt of defrauding the Territory of funds properly in his possession, didn't you?

A. Yes.

(Deposition of Neil F. Moore.)

Q. And you said this case closely parallels the Oscar Olson case? A. Yes.

Q. Implying that the three members of the Board were defrauding [181] the Territory, didn't you?

Mr. Faulkner: I object to that question.

A. I didn't say they were defrauding the Territory. I just said the device was similiar.

Q. You haven't pointed out wherein it was similar. You don't know who was authorized to draw on this checking account.

A. It doesn't make any difference. The device was the same in both cases. There is your parallel. It was up to the Attorney General, if he wanted to follow through, to find out who was wrong and who was right. Here is the device which is being used. There is the parallel.

(Reading suspended.)

Mr. Nesbett: Just to interrupt a moment, your Honor, with respect to these objections. I noticed your Honor might be making notes. We have stipulated that—Mr. Faulkner wanted to permit Mr. Moore to go on "Outside"; he was no longer going to live in the Territory—and the deposition would be admitted regardless of the form of any question, and so any objection that Mr. Faulkner makes during the reading of the deposition is waived in the stipulation.

The Court: I take it in the reading of all these

(Deposition of Neil F. Moore.)

depositions that objections made at the time of taking are waived unless they are renewed here?

Mr. Kay: Right. [182]

Mr. Faulkner: We don't have any, your Honor.

The Court: So that, if any objections were made, that you would make them.

Mr. Faulkner: We haven't any.

(Reading resumed by plaintiffs.)

Q. Why didn't you say that the account was an unauthorized-type account rather than compare it to a case of admitted fraud and admitted guilt?

A. How did I know? There is three hundred dollars short.

Q. You didn't know it then?

A. Well, I know it now.

Q. You didn't know it then?

A. Well, here is something else that is wrong with it, then. Here I knew that payments were being made out of it. Every single payment made was illegal.

Q. You only knew of one payment at that time?

A. One was all that was necessary.

Q. You only knew of one payment at that time, didn't you, that is, a proposed payment to Steve Homer?

A. The check was written and was all that was necessary, because that certainly would lead you to believe that others had been made.

Q. Actually, you knew that the account had been in existence for months, didn't you?

(Deposition of Neil F. Moore.)

A. No. [183]

Q. Back to the time when the vouchers for payment out of the Motor Fuel Tax Fund had ceased to come through your office?

A. I didn't know payments were being made from it until this check was brought to my attention.

Q. Maybe you didn't see any actual checks on it, but you knew the fund existed and that they were paying expenses in some manner, didn't you?

A. Sure they were paying them on the vouchers, because I was getting vouchers.

Q. You weren't getting vouchers the last two or three months, were you?

A. I don't know if they were or not.

Q. You hadn't been getting any vouchers to be paid out of the Motor Fuel Tax Fund for several months prior to the check for Steve Homer on the Chilkoot Ferry Fund?

A. I must have been. If I hadn't, it didn't concern me too much, because as I said before, we might be a month or two months in some cases getting expense vouchers in for some of the offices. A lot of the offices hold them up until the end of the month, or whenever they get enough. We might get two or three hundred of them at a crack. The big departments, for instance, they will send theirs in once a week, not day by day, but once a week. Some of the others maybe once a week, and some send them in [184] as they write them, maybe one a day.

(Deposition of Neil F. Moore.)

Q. Actually you knew that fund existed for some time, didn't you? A. No, I didn't.

Q. And that they were not paying the expenses out of the Motor Fuel Tax Fund by submitting vouchers to you for several months prior to the running across of Steve Homer's check, and you held it up so that you could break the news to the Daily Alaska Empire just before election time?

A. No. I can answer that just plain "no."

Q. All right. Tell me about this three hundred dollar shortage. Where did that occur in the fund?

A. When the auditors got through there was three hundred dollars short.

Q. Did you check with the auditors to see where it might occur?

A. I asked them. It proved out three hundred dollars short.

Q. That audit was made at the end of 1952, was it? A. Yes.

Q. Was the check of Steve Homer ever cashed out of that fund? A. No.

Q. Was that money ever paid to Steve Homer?

A. As I understand, the Legislature had to pass a special [185] act to pay him.

Q. You were Auditor when the result of that audit came out, were you? A. Yes.

Q. Did you do anything about the three hundred dollar shortage? A. Yes.

Q. What did you do?

A. Gave it to the Attorney General.

Q. What did you say?

(Deposition of Neil F. Moore.)

A. I called it to his attention that there was three hundred dollars short and that eleven or twelve thousand dollars in illegal payments were made. I don't know what else, but that was the gist of it.

Q. What did the Attorney General say to you or do about it?

A. He didn't say anything to me.

Q. He never answered your letter?

A. I don't recall if he did or not.

Q. Well, did you let the matter drop right there?

A. It was his baby then. I couldn't do anything more.

Q. Well, you don't know whether he answered your letter or not?

A. I don't recall. He may have answered it, but I don't recall what else he did.

Q. Did you ever talk with the auditors, Anderson and Company? [186] A. About what?

Q. The result of their audit which showed a shortage.

A. Well, yes, I always went over it with them. It isn't the first audit they ever made. We used to go over all of them to see that we both understood one another.

Q. Where did the shortage occur?

A. Well, they collected three hundred dollars apparently in fares or on freight, and there is no record of it other than what Arthur Anderson and Company found, and where they found it I don't know.

(Deposition of Neil F. Moore.)

Q. Are they in Seattle? A. Yes.

Q. Arthur Anderson and Company?

A. Yes.

Q. Do you happen to recall their address?

Mr. Faulkner: Arthur Anderson and Company, Dexter Horton Building, Seattle, Washington.

Q. A regular complete audit report was made to you on that fund, wasn't it, Mr. Moore?

A. Yes. It isn't what they call a detailed audit, a balance sheet. That would include all the departments that handle money.

Q. All the departments that handle money?

A. Yes.

Mr. Nesbett: I think that is all. [187]

(Reading concluded.)

Mr. Nesbett: That is all of the deposition of Neil Moore.

(Whereupon, Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; whereupon the trial proceeded as follows:)

Mr. Nesbett: Your Honor, at this time we would like to publish the deposition of Jack E. McFarland, formerly an employee of the Empire, taken in Anchorage, Alaska, on October 1, 1955.

The Court: Very well.

Mr. Nesbett: Appearances were Buell A. Nesbett, of Attorneys for Plaintiffs, and Norman Ban-

field, of Attorneys for Defendant. "Jack E. McFarland being first duly sworn upon oath, deposes as follows on Direct Examination by Mr. Nesbett:"

(Whereupon, the deposition of Jack E. McFarland was read as follows—questions by Mr. Nesbett and answers by Mr. Kay:)

DEPOSITION OF JACK E. McFARLAND

(Reading.)

Q. Is your name Jack E. McFarland?

A. Jack E. McFarland.

Q. McF-a-r-l-a-n-d? A. That is right.

Q. What is your profession, Mr. McFarland?

A. At the present time I am teaching school.

Q. And where are you employed?

A. For the Territory of Alaska at Nondalton, Alaska.

Q. And I will ask you whether or not you were employed by the Empire Printing Company in Juneau in the year 1951-52? A. I was.

Q. And in what capacity were you employed there?

A. First as a reporter covering the Federal Building and general reporting, feature writing, and later as managing editor.

Q. Mr. McFarland, do you recall the dates of your employment with that corporation?

A. From October 1, 1951, until late in the sum-

(Deposition of Jack E. McFarland.)

mer of '52 and I don't know my exact date of termination.

Q. Can you state the month of termination?

A. I——

Mr. Banfield: August 9, Jack. I looked that up.

A. Thank you.

Q. Now, Mr. McFarland, had you had any newspaper experience prior to going to work for the Juneau Empire? A. Yes.

Q. Will you state briefly the experience you had had in newspaper work prior to working for the Juneau Empire?

A. Well, my first full-time job, other than working around [189] various small papers, was with the Wichita Beacon, a daily, at Wichita, Kansas.

Q. In what capacity were you employed by that paper? A. As reporter and night editor.

Q. State any other newspaper experience you have had, if any?

A. Leaving the Beacon I went into the Marine Corps. After my service with the Marine Corps, I got out in January, 1945, I went to work at Halstad, Kansas, for a weekly, The Halstad Independent. I was employed there for approximately 2 years and again I don't know the date of when I left there.

Q. Did you have any newspaper experience subsequent to working for the Halstad Independent?

A. I left the Halstad Independent to go to work for the Hutchinson News Hearld, a daily.

(Deposition of Jack E. McFarland.)

Q. And in what capacity were you employed there?

A. I was a reporter for the courthouse with the Hutchinson News Hearld and I was employed there for about a year at which time I quit for the purpose of trying my hand at free-lance writing. My wife and I moved out to Colorado. We bought a very small business out in Fairplay, Colorado, and I spent considerable time working with the Court County, a small paper there. I was hired as a publicity man for the then big celebration they had each [190] year there and I did writing for the Rocky Mountain News and the Denver Post, both Denver papers.

Q. Now, Mr. McFarland, will you state the circumstances connected with your going to work for the Juneau Empire?

A. Well, I was hired by Mr. Beard on the telephone—before then I had worked for another small paper in Colorado and had gone to Denver as public relations man, press relations man for Gates Rubber Company, which entailed work that I did not exactly care for, which was turning news stories over to the Denver papers which sort of patted Gates on the back and it soon became rather depressing to me. So I wrote letters to Alaska. Having long wanted to come up here I wrote letters to Alaska papers. I received replies from 2 or 3 of them; one of them from the Daily Alaska Empire, and it sounded favorable and I answered their letter. The letter was from James Beard. I said

(Deposition of Jack E. McFarland.)

that I would like to come, but I wanted to know more detail about what the work would be and in a day or 2 after there had been time for him to receive my letter, I guess, I got a call at the office of Gates Rubber Company. The switchboard girl said, "Mr. McFarland, you have an overseas telephone call." Everyone was very surprised and, frankly, I was rather embarrassed. I had to take the call in front of my boss and fellow employees there, but I did and I accepted the [191] job, although I had to give notice to Gates.

Q. Now, prior to coming to Alaska to work for the Daily Alaska Empire, did you have any knowledge of the political situation in Alaska?

A. None at all.

Q. After arriving in Juneau were you given any instructions by officials of the Daily Alaska Empire with respect to editorial policy in connection with your political reporting?

A. Yes, I soon found out—well, I remember that the Denali Alaska Steamship boat docked there at Juneau at night. I remember it was very rainy. I remember Beard met me at the gangplank.

Q. What was Mr. Beard's capacity with the Empire?

A. He was formally business manager, however, he had rather strange power around there. He was more or less in control of all the functions of the paper, although Helen Munson, of course, was the boss of the whole operation.

(Deposition of Jack E. McFarland.)

Q. Mr. McFarland, go ahead with your answer in connection with Mr. Beard?

A. Beard met me at the dock. We went over to Mike's for a midnight snack and a few drinks and he was very happy for me to arrive. I would not have any preconceived notions of the political scene, according to him, and he felt that I would be just the man to help him in this [192] job, which seemed to be the main purpose of the paper at that time to find something which would either cripple or embarrass the Gruening Machine and talk with Beard that night was rather long and nearly all concerned what had to be done to find something on the Gruening Machine, Gruening and his co-workers. After that I met Helen Munson the next day.

Q. I will ask you whether or not you received any instructions from Helen Munson with respect to editorial and reporting policy as concerned the Gruening administration?

A. Well, it was always first there. It was always with Jim and Helen together. I was with them a great deal.

Q. Now, Jim is Jim Beard, is it?

A. Jim Beard, yes.

Q. And Helen is Helen Munson?

A. Yes, sir.

Q. What was Helen Munson's connection with the Daily Alaska Empire?

A. She was publisher and majority stockholder.

Q. Now, go ahead and answer the question.

(Deposition of Jack E. McFarland.)

A. Well, Mrs. Munson and Beard seemed to be giving me an indoctrination course. That is the way it appeared to me, and, frankly, I was green. I was interested. I wanted to know everything, however, from their viewpoint. [193] I only got one side of the story, of course, and that was that Gruening and most of the people who worked under his administration were absolutely no good and it was a machine that had to be broken up for the good of Alaska. That took place over some time. It was a matter of talking over a few drinks in Mr. Beard's apartment and at Helen's house, out to dinner together, a party here and there, and other people were drawn in to help me get started on the right track, I guess, such as Mark Jenson, he is a senator, and Pete Gilmore, who is a lobbyist for the Salmon Industry, and other people.

Q. Will you explain what you mean when you say Mark Jenson and Pete Gilmore were brought in to assist Mrs. Munson and Mr. Beard?

A. Well, that was my impression and they were brought in and introduced to me with such remarks as "Here is somebody that can give you the right dope now." That was the trend to get me started right there so I would know what the true picture was concerning the political scene in Alaska because I was—I might say, I was brought up to be the managing editor and they wanted someone they could trust.

Q. Mr. McFarland, I will ask you whether or

(Deposition of Jack E. McFarland.)

not Helen Munson ever expressed any personal opinion of Governor Gruening to you? [194]

A. She did at several times, yes, and it was with the utmost hatred. There were at least two specific times that I can remember where she said something of the sort that Gruening was absolutely no-good and anything that could be done to get him out of there was not unethical to do it which was the reason that question came up, when I questioned certain policies, and I might say there was some heat with her remarks concerning Gruening. It was not a matter of calm instruction to me. Her remarks were made with evident feeling of hatred and dislike.

Q. Can you state the degree of hatred she exhibited to you in these remarks concerning Governor Gruening?

A. It was quite vehement and it was a hatred which seemed to me to border on phychosis. Now, I am interested in psychology, but I don't claim to be an expert, but certain things would make anyone realize that, I believe. There could be no joking or humorous talk with her about Gruening. It all had to be serious. Any mention of his name was likely to bring on a, I would say, an angry flush to her face. It was something that I don't believe I had ever seen before—such an intense hatred of anyone and it was undoubtedly deep seated. I don't know what the original motivation was, but I have noticed when, at certain events, Governor Gruening might be one of the [195]

(Deposition of Jack E. McFarland.)

speakers of the evening and she was present off-hand humorous remarks by Gruening which might bring chuckles from anyone else only brought an angry flush to her face and it evidently made her unhappy that other people thought it was funny.

Q. Now, Mr. McFarland, I will ask you whether or not Mr. Beard ever expressed any personal opinion of Governor Gruening and his administration to you?

A. Many, many times and I would say that Beard's feelings on the subject were not the same as Mrs. Munson's, although his efforts were very intense toward trying to discover something that might embarrass Governor Gruening or his administration, but he had a very scheming attitude about the whole thing and it was not like Helen's—a deep hatred in the man. I have heard him say that he is probably one of the smartest men in Alaska and said, "All the more reason we have got to do something about it," and well, the whole purpose of the paper, while I was there, as far as I could see, was to get something on Gruening and the administration. The business end was going to pot and it was obvious to everybody and whether there was money in the bank was not important, it seemed to me. If there was something in the news that tended to embarrass Gruening and his administration that made up for all the deficit, I think. [196]

Q. Mr. McFarland, I will ask you whether or not Mr. Beard ever expressed any opinion of Frank Metcalf personally to you?

(Deposition of Jack E. McFarland.)

A. Oh, yes. I might say that Beard thought that Metcalf was incompetent, if not crooked and I can recall him talking about Mr. Metcalf being a stupid son-of-a-bitch and no-good. Another thing I would like to say here which seems to me to show how low Beard was in his attitude, I remember at one time I accompanied Beard to the Democratic meeting over in Sitka. It was a convention.

Q. Do you recall the approximate date?

A. It was—should have been about November of 1951.

Q. Go ahead.

A. And I walked into Bob DeArmoun's shop over there with Beard and Bob and Beard greeted each other very cheerfully and the first remark of Beard's was, "Well, Bob, have you thought of any way we can get that God-damn kike out of office yet," and DeArmoun's remark was, "No, but we should have a chance to work on it."

Q. Now, I will ask you whether or not Mr. Beard or Mrs. Munson ever expressed any personal opinion of the plaintiff, Henry Roden, to you?

A. I can't answer that except for hearing Helen talk about Henry and being with Helen when she talked to Henry. I [197] would say that Mrs. Munson had some regard for Mr. Roden and I don't know that she had any feeling about Henry except that, I believe, since this business came up that since Henry was under Gruening, that whether he was a friend or not did not make any difference with her, or at least not enough to prevent his being

(Deposition of Jack E. McFarland.)

involved as long as something could be done to get Gruening out of office.

Q. I will ask you whether or not Mrs. Munson ever expressed any opinion of Frank Metcalf to you?

A. I can't answer that. All I can answer is that I don't know, except, I mean, there was a whole run-down from time to time about who was okay and who was not okay and I suppose Frank's name was mentioned.

Q. Would you state that Frank's position, as far as Mrs. Munson was concerned, was somewhat to that of Roden or any other official connected with the Gruening administration?

A. I would say it was somewhat different. My opinion is that I don't believe Mrs. Munson cared a great deal for Frank Metcalf. I just cannot say anything specific to support that, but I do know she did have some regard for Henry Roden and I don't believe she did for Frank Metcalf. They both fell into the same category eventually so—— [198]

Q. I will ask you whether or not you had, during the period of your employment, differences of opinion with Mr. Beard and Mrs. Munson over their editorial and reporting policy as concerned the Gruening administration?

A. I certainly did have. It began not too long after I was there but I always felt that something could be changed around there to make that Daily Alaska Empire the paper that it should be. I wanted to try to help make the paper it should be for the

(Deposition of Jack E. McFarland.)

capital city daily paper, but arguments did go on from the time I took over the desk until the time I quit because there was one scene after another around there. I might say, even before then I did a very bad job of covering the Federal Building simply because I could not write what I thought was the news of the day because I never knew what Helen was going to say about what I wrote about the various officials. What I mean is, your job as a reporter is to interview your officials on your beat. Well, if I were to interview Governor Gruening or George Sunborg or Frank Metcalf or others I never knew how Helen would feel about what I had written, although I was reporting the news as it was given to me at least and what I saw.

Q. Mr. McFarland, will you state as nearly as you can when the first such difference of opinion and argument arose?

A. The first serious breach was before I took over the desk. [199] I cannot recall the exact date. I could check very easily. It was the date of the publication of the photographic reprints of the pages of the California Investigating Committee's book on Un-American Activities purporting to show that Governor Gruening had been tied up with Communist front organizations and I felt it was a very low, very unethical thing to do because these —well, it was just the plain tactics that McCarthy used, which to me was entirely wrong, and they gave Gruening no chance. They blasted—he was all over the front page and with headlines which

(Deposition of Jack E. McFarland.)

seemed to make it no doubt that he was a Communist and we had him as Governor in office and I felt very strongly that that was wrong as far as government practices went and I argued with Beard about that; to no avail, of course. It went in the paper. The next day my job was to go up and ask Gruening whether he was now or ever had been a Communist and I don't believe he hid behind the 5th Amendment, but I forget what his answer was at the time, but it was the evidence that they produced which was actually so flimsy that I, and the sources from which it came——

Q. What were those sources?

A. As I subsequently learned this so-called discovery that Gruening had been connected with organizations which were somewhat subversive came from, well, what I consider [200] a wild-eyed fanatic in the mid-west. I don't remember the man's name. He did have a radio program out of Tulsa, Oklahoma, I believe. He is a very wealthy man and is in the oil tool business, I believe. I can't recall his name now, however, I do recall seeing a letter written to Beard by this man commending him for his publication and offering further help and probably from—now here is where my memory fails me—it was either Gerald L. K. Smith, or Gerald Winrod, both of whom have been condemned, by at least as many people, of certain Communist ideas.

Q. Can you state whether or not any of these so-called sources had criminal records?

(Deposition of Jack E. McFarland.)

A. I believe that Winrod was convicted during the war of—I can't state the charge. He was found guilty, I believe, of—it was against the war effort, at least, or something like that.

Q. Can you state any other instances where you had differences of opinions and arguments with Mr. Beard and Mrs. Munson in connection with their reporting and editorial policy as concerned the Gruening administration?

A. It went on from day to day, of course. Sometimes maybe we would stay clear of each other for a week or two and at other times it was just a constant battle around there. However, the next major thing that I recall, as [201] I remember now, was during these—something about this Palmer Airport case up here. Now, when the story originally broke I was not at the Empire. That was before my coming there. However, there was some decision made by the Comptroller General of the United States while I was on the desk there and some very brief wire story came through concerning the Palmer Airport and I believe that it was a decision which was adverse to its successful transaction. At least it was encouraging to Beard and Mrs. Munson and there was some happiness over it, as I remember. Something about the Comptroller General had made a decision to not pay for the land, but to pay for certain other costs, but not the major cost. But it was the story, it was probably a 2-paragraph story, and when Beard saw that he wanted it splashed all over the front page. I told him it seemed im-

(Deposition of Jack E. McFarland.)

portant enough to me all right, we should have it prominently displayed, but the story itself would not carry a big headline. It was a small story and I sent it out to the back to be set in bold-face type. I intended to place it in a box up in the upper right-hand corner of the paper. That did not satisfy Beard at all. He wanted a banner headline across the front page that the decision had gone against Gruening and we had a very hot argument about it and I offered my desk and chair to Mr. Beard, saying that if [202] he wanted to run the paper he better sit there and run it.

Q. What was your objection to giving the story the prominence Mr. Beard apparently desired?

A. Well, it was not that much of a story. I had no feeling about it one way or the other. In fact, I did not and still don't know the details of the case, but it was not important enough story to be given more than what A.P. gave it with perhaps a little background on it. A banner headline on a story like that would be plain ridiculous and would make the paper look ridiculous and very biased, which, of course, it was intended to be by Beard and Helen. When I say Beard, I mean that he was the errand boy between the newsroom and the front office as much as he was the general manager and he would confer with Mrs. Munson about these things at times and at other times he would tend to make the decisions himself. Whether Mrs. Munson was even in town at that time I don't know, but at any rate, we had a real falling out over that and

(Deposition of Jack E. McFarland.)

I don't believe we had a whole lot of social contact after that because it was obvious that we couldn't agree about what was right and what was wrong with the newspaper.

Q. What objection did you have in general with the reporting policy sponsored by Mrs. Munson and Mr. Beard?

A. Well, just too many attempts for distortion of facts and [203] to me unethical procedures in the newspaper business. My idea of running a newspaper is to get all the news that you can, print and present it as fairly as you can, and if you want to say—whatever you want to say, say it in your editorial column; that is your business and probably part of the function of a newspaper, but it is not the function of a newspaper to editorialize in all the news columns and it was done time and again in the Empire, directly and indirectly, by the emphasis given certain stories and like emphasis given other stories. Now, that goes against any newsman and I never worked for a paper before where that was done. I might say that it is an odd thing, and I never thought about it until just the other day, but the Daily Alaska Empire was the first Democratic paper I ever worked for. All the rest had been Republican papers, and I had never seen that much bias on any papers that I have worked for.

Q. Mr. McFarland, will you state why you left the employment of the Daily Alaska Empire on August 9, 1952?

(Deposition of Jack E. McFarland.)

A. Well, it was a combination of another argument which had no way of being resolved.

Q. What was that argument about?

A. It again concerned the Gruening gang. Governor Gruening had just returned from the Democratic Convention of 1952, National Convention, where Adlai Stevenson was nominated [204] and he had been on the scene, and I thought it would make a fine story getting a local person's picture of what had happened back at the National Convention. Since Juneau is rather political minded I was sure the story would be widely read. I sent one of my reporters, Erv Jenson, to talk to Governor Gruening about his experiences at the Democratic Convention and he got a long interview with Governor Gruening and I thought it was very interesting and it was the best story of the day as far as I was concerned. I think if we could check back we would find out there was nothing else that good of a story for the day, and I ran it in the top position in the paper and there was certainly an emotional explosion around there when the paper came off the press. Helen acted as I had never seen her act before. She tore into the newsroom and slammed the paper down and she was almost in tears, in hysterics. She was hysterical and saying she had never, never thought she would see any such thing in her paper and why did I do it to her and—oh, she was very upset and I tried to reason with her, which was always a futile thing where Governor Gruening was concerned, but she said that nothing like that should

(Deposition of Jack E. McFarland.)

ever be in her paper; that Governor Gruening was no-good and, oh, she said a lot of things, that he should be exterminated and such things as that, but at any rate I [205] got no satisfaction in talking to her and I offered her my job, that I would quit, and I don't believe that she was hardly aware that I was telling her that I would quit, but I did talk with Beard and he agreed and raved and ranted about what a terrible thing I had done and I told him that it was time that I left there I thought and that I thought they should get someone else and he better just fire me. Well, I will say now that I tried more than one time to get Beard to fire me. I had had enough and I really didn't want to quit. I wanted to do a job there and it was eternal optimism, I guess, I thought perhaps I could, but I did try to get Beard to fire me and he wouldn't fire me. My motive for trying to get him to fire me was probably confused—I hadn't been there a year and I thought I might as well get out of the Territory and since I hadn't been there a year the Empire would probably have to pay my way back down to the states if I was fired rather than quit and he wouldn't fire me so I quit and I gave him 2 weeks' notice.

Q. Now, is it your testimony then that the editorial and reporting policy of the Daily Alaska Empire continued up to the time you quit on August 9, 1952? A. Then and after then, yes.

Q. Now, do you have any personal interest in the outcome of this case? [206]

(Deposition of Jack E. McFarland.)

A. None at all.

Mr. Nesbett: I believe that is all.

Cross-Examination

By Mr. Banfield:

(Reading suspended.)

Mr. Nesbett: Mr. Banfield representing the defendant.

(Reading resumed.)

Q. This Democratic Convention you spoke of, is that the one at which Gruening supported Kefauver so strongly and then came back and told you how he supported Stevenson?

A. He supported Kefauver strongly, I understand, but I don't believe that he said in that story that he supported Stevenson, although his personal likes were Stevenson.

Q. What do you think—he wrote the article?

A. Yes, he wrote the article.

Q. Gruening? A. Yes.

Mr. Nesbett: Off the record.

(Reading suspended.)

Mr. Nesbett: The next one is an answer.

(Reading resumed.)

A. Erv asked him for an interview and for his ideas on the convention and Gruening sat down and wrote the story of [207] the convention and gave it to Erv and I ran it.

(Deposition of Jack E. McFarland.)

Q. It was a very glowing account of Stevenson, wasn't it? A. I believe it was.

Q. You wanted to send it back to Stevenson, didn't you? A. Possibly.

Q. Jack, sometime after that you did get interested in some other newspaper in Juneau, didn't you? A. That is correct.

Q. What paper is that?

A. Juneau Independent.

Q. And what company publishes that paper?

A. That is called News, Incorporated.

Q. How long had you left the Empire before you joined that paper?

A. Well, the first issue of the Independent came out September 3, I believe, and, of course, there was 2 weeks preparation or more.

Q. Well, you left the Empire with the intention of joining the Independent, too, didn't you?

A. Not really. As I say, I was ready to leave the Territory. I will tell you exactly what happened. Maybe this will clear it up. James Woodruff, who was circulation manager for the Empire at that time, wanted to know what I was going to do. I told him I really didn't know, that I would probably leave. [208]

Q. Then you did decide soon after that, however, did you, to help form the Independent?

A. Very shortly.

Q. Just to make it brief——

A. Yes, before I had—after I had given notice

(Deposition of Jack E. McFarland.)

and before I had quit I made up my mind to start the Independent, yes.

Q. You are still a stockholder of it?

A. I don't know how to answer that. I don't own any stock in it right now, although Mr. Sunborg owes me some money from the shares——

Q. Shares that you did have?

A. Yes, and if he doesn't pay me I can take the stock back.

Mr. Banfield: That is all.

A. One thing I would like to say here for the record though no one asked me, but it sounds ridiculous after what I said, but I have a great deal of personal regard for Mrs. Munson and I think she has some for me. I think she is a warm hearted woman and she is a fine person, but I do think she was, for some reason, misguided in her hatred for Cruening and it hurt her. That is about all.

Mr. Nesbett: No further questions.

(Reading concluded.)

Mr. Nesbett: That is all of the deposition. [209]

FRANK A. METCALF

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Nesbett:

Q. Will you state your full name, Mr. Metcalf?

A. Frank A. Metcalf.

(Testimony of Frank A. Metcalf.)

Q. Where do you reside, Mr. Metcalf?

A. In Juneau.

Q. And how long have you resided in the Territory of Alaska? A. Forty-two years.

Q. And did you commence to reside in Juneau immediately upon coming to Alaska?

A. I came direct to Juneau; yes.

Q. And isn't it a fact that your entire residence in Alaska has been in or very near Juneau except when away on work?

A. With the exception of the World War; I was in Sitka for three years during the War.

Q. Mr. Metcalf, what is your profession?

A. Civil and mining engineer.

Q. Will you state briefly, give the Court briefly a biographical sketch of your background from the time you studied to become a professional engineer up to the present?

A. Well, I graduated in engineering and was later given a master's degree in civil. [210]

Q. Where did you receive that master's degree in civil engineering? A. Cornell.

Q. And go on from there, Mr. Metcalf.

Q. I was with the Milwaukee Railroad on the early work in the Bitter Root Mountains in Eastern Washington and on location and then I went to work for the Bunker Hill and Sullivan Mine in Warner and transferred from there to Alaska Juneau in Juneau. I worked for them for two years, three years probably. Then I went into work for myself.

(Testimony of Frank A. Metcalf.)

Q. And what was the nature of your self-employment?

A. General engineering, surveying and patent work on mining claims, anything that required an engineer's report.

Q. I will ask you whether or not you have a wide acquaintance in Southeastern and all over Alaska?

A. I would say, yes, I did—I have.

Q. Now, as of September 25, 1952, isn't it a fact that you were the Territorial Highway Engineer, Mr. Metcalf? A. Yes, I was.

Q. And when did you first assume that office?

A. I was appointed to the job to fill out the term, the unexpired term, after the death of Leonard Smith, who had been the Highway Engineer prior.

Q. And in what year were you appointed? [211]

A. I think that was in '47.

Q. I will ask you whether or not you subsequently ran for election for the office of Territorial Highway Engineer?

A. I ran for election the following spring.

Q. That would be in 1948, Mr. Metcalf?

A. It was the first election after that, I know.

Q. Were you elected?

A. I was elected; yes.

Q. For what period of time?

A. For a four-year period.

Q. And I will ask you whether or not you served during the entire four-year period as Territorial Highway Engineer? A. Yes.

(Testimony of Frank A. Metcalf.)

Q. And at the coming of the next election for that office did you run again?

A. I ran again the next election.

Q. And in what year was that, Mr. Metcalf?

A. That was in '53.

Q. Well, the election, what year was the election in? A. Well, the election was in '52.

Q. Do you recall the month in 1952?

A. It was in November.

Q. Well, now, are you sure it was November, or might it have been October?

A. Well, it was in the fall elections. It would be October, [212] I believe.

Q. It is a matter of common knowledge, isn't it, that the election was held in October?

A. Yes. But I held office until the first of April the following year.

Q. Of 1953? A. Yes.

Q. Were you elected in the election of 1952-53?

A. I was defeated in the fall election; yes.

Q. And who defeated you, Mr. Metcalf?

A. The present incumbent, Mr. Reed.

Q. Now, I will ask you whether or not Mr. Reed was your opponent in the primary election for the office of Territorial Highway Engineer?

A. Yes, he was.

Q. Can you state, roughly, by refreshing your memory from these papers I hand you, the relative vote standings between you and Candidate Reed at the conclusion of the primary election?

A. At the conclusion of the primary I received

(Testimony of Frank A. Metcalf.)

10,703, and he received 8,170, leaving a majority of 2,533 in the primary.

Q. Pardon me. Will you repeat that please—the majority what?

A. That was a majority of 2,533 in the primary. [213]

Q. In whose favor? A. In my favor.

Q. And can you state the results of the general election for the office of Highway Engineer?

A. In the general election he received 12,528, and I received 11,907, leaving a difference of 621 in his favor.

Q. Now, that was the general election of October of 1952, was it not, Mr. Metcalf?

A. Yes, sir; it was.

Q. Now, after you left office—did you say you left office in April of 1953?

A. The termination of my term; yes.

Q. Did you then commence to practice your profession, that of civil and mining engineer?

A. Yes.

Q. And were you immediately employed after leaving office in April, 1953?

A. I was that summer; yes.

Q. Well, then, what month, can you recall, in the summer of '53? A. Well, it wasn't until July.

Q. And what was the nature of your work from July onward?

A. I was with the Admiralty Alaska Gold Mining Company on Admiralty Island.

Q. What was your salary, Mr. Metcalf, as Ter-

(Testimony of Frank A. Metcalf.)

ritorial Highway [214] Engineer during the time you held office? A. Eight thousand.

Q. Eight thousand dollars per year?

A. Yes.

Q. And what was your monthly salary, approximately?

A. Well, I would say around seven hundred.

Q. Seven hundred dollars per month?

A. Take-home.

Q. Now, Mr. Metcalf, I show you a copy of Plaintiffs' Exhibit 1, the front page of the Daily Alaska Empire of September 25, 1952, and ask you if you recall seeing that edition on or about that date?

A. Yes, I do.

Q. Will you state your first reaction after reading that portion of the front page concerning the operation of the Ferry Chilkoot?

A. Well, I can certainly say I was deeply hurt, to start with, having lived in the Territory all this length of time, to have my name spread over the front page of a paper as being a crook and compared to an admitted criminal.

Q. Mr. Metcalf, was there such a thing as the so-called ferry fund? A. Yes.

Q. Can you briefly give the Court a background, the Court [215] and the jury, a background summary as to how that fund was commenced and why it was commenced?

A. The year prior to this I had been operating, as a member of the Board, operating the ferry between Juneau and Haines on the Motor Fuel Tax.

(Testimony of Frank A. Metcalf.)

Q. Now, when you say the year before this, you mean the year 1951, do you?

A. The year 1951—which took a considerable amount of money from the, receipts from the Motor Fuel, and traveling over the Territory——

Q. Well, Mr. Metcalf, possibly it would keep it more in chronological order if I asked you questions. Did the Territory of Alaska buy this ferry called the Chilkoot? A. Yes; it bought it.

Q. And in what month of the year did they buy that ferry? A. In the spring of '51.

Q. Do you recall the month?

A. I think it was in May.

Q. Had the Territory owned the ferry prior to May of 1951? A. No.

Q. Can you state to the Court and the jury why the Territory purchased this Chilkoot Ferry in May of 1951?

A. It was to close a gap between the highway of the Interior and Southeastern and it was to substantiate the promises and the advertising which we had done through the papers [216] in the States whereby people could make the connection from the highway to the Inside Passage and south.

Q. You mean advertising throughout Alaska and the States that people could drive over the highway system of the Territory and take their cars from Haines, the terminal of one branch of the Territorial highways, and travel to Juneau on the ferry, and subsequently to Ketchikan and on "Outside" on Alaska Steam?

(Testimony of Frank A. Metcalf.)

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(Testimony of Frank A. Metcalf.)

A. Yes. That was our advertisement.

Q. I will ask you who operated that ferry prior to the purchase by the Territory in May of 1951?

A. I think Bob Sommers owned it prior to that.

Q. Then, is it your testimony that it was owned and operated prior to the purchase by the Territory by private individuals? A. Yes.

Q. Well, then, why did the Territory not permit those private individuals to continue to operate the ferry rather than have the Territory purchase it?

A. I don't quite get your question on that.

Q. Well, why didn't the Territory, or why didn't you as Territorial Highway Engineer, encourage Sommers to continue to operate the ferry rather than have the Territory buy the ferry and operate it themselves?

A. Well, he bought it for his own use. He had several [217] contracts in different sections of the country and he would transfer his machinery on this boat to the different places, but the strictness of the Coast Guard prevented his landing on the beach, and it became of no further use to him.

Q. I will ask you this. Did Mr. Sommers in the spring of 1951, prior to the purchase by the Territory, propose to operate that ferry between Haines and Juneau so that you could live up to your advertising promises?

A. Yes, he did, but his requirements were too stringent, and he couldn't meet them.

Q. Then, is it your testimony in essence that Mr. Sommers, as a private individual and owner of the

(Testimony of Frank A. Metcalf.)

ferry, was unable to operate the ferry as you needed to have it operated? A. Yes.

Q. Was that the reason then for the purchase by the Territory?

A. Well, that was one of them. We had to maintain this service.

Q. Were there any other reasons?

A. Well, it was a part of our road system and was the cheapest maintenance of sixty-five miles of road that I could figure.

Q. After the Territory purchased the Chilkoot in May of [218] 1951, what method was used to defray the operating expenses of the ferry?

A. It came in on the Motor Fuel Tax.

Q. Now, what is the nature of this Motor Fuel Tax Fund?

A. It is two cents on a gallon for all motive fuel collected from all over the Territory.

Q. Now, in other words, the Territory taxes every gallon of gas purchased two cents and that money is paid into the Territorial Treasury into this fund?

A. Yes; and is used by the Alaska Road Commission, or Board of Road Commissioners.

Q. All right. Is this fund, called Motor Fuel Tax Fund, what is called or known as an earmarked fund?

A. It is an earmarked fund for purposes for which it is collected.

Q. And what is, in short, an earmarked fund, so the jury will understand it thoroughly?

(Testimony of Frank A. Metcalf.)

A. Well, it is collected for purposes, can be only used for the purposes for which it is collected. In this case it was for roads and harbors and harbor facilities.

Q. All right. Now, Mr. Metcalf, can you state, in brief, and not in great detail, how a disbursement would be handled from the commencement of the incurrence of the obligation to receiving final payment when the money was taken out of this earmarked Motor Fuel Tax Fund? [219]

A. The vouchers were written on and were turned over to the Auditor and paid by the Treasurer.

Q. And, as a general matter, how long did it take for those vouchers to be processed and the person entitled to receive payment to actually get his money?

A. Considerable time elapsed. It was not an immediate cancellation of the debt. It took sometimes weeks to get vouchers through.

Q. And, now, how were the receipts, that is, the cash receipts, from the operation of the ferry handled after the purchase in May of '51?

A. They were directed right into the Treasurer's Office. It didn't go through my office at all.

Mr. Faulkner: What was the question?

Mr. Nesbett: Will the reporter read it?

Court Reporter: "Q. And, now, how were the receipts, that is, the cash receipts, from the operation of the ferry handled after the purchase in May of '51?"

Mr. Faulkner: Thank you.

(Testimony of Frank A. Metcalf.)

Mr. Nesbett: And will you repeat the answer please?

Court Reporter: "A. They were directed right into the Treasurer's Office. It didn't go through my office at all."

Q. (By Mr. Nesbett): Then, Mr. Metcalf, after the receipts——

The Court: Is it a convenient place to stop, counsel? [220]

Mr. Nesbett: Yes, sir.

(Whereupon, the jury was duly admonished, and the trial was recessed until 2:00 o'clock p.m., November 16, 1955, and resumed as per recess, with all parties present as heretofore and the jury all present in the box; whereupon the trial proceeded as follows:)

The Court: Before proceeding, I dislike to discommode you, ladies and gentlemen of the jury, but I would like to ask that you be excused for just a very few minutes, three or four minutes, while we discuss a matter, and then we will call you back. The grand jury room is now available for your convenience at any time.

(Whereupon, the jury retired from the courtroom; and the following proceedings were had:)

The Court: Is Mr. Allen in the courtroom? Mr. Allen, would you come forward please? I understand that you are the new publisher——

Mr. William Prescott Allen: That is right.

The Court: ——of the Daily Empire?

Mr. Allen: That is right.

The Court: Word has come to the Court, Mr. Allen, that you are offering to bet in public places on the outcome of this trial. I wonder if that is true?

Mr. Allen: Well, could I explain that, or do I just have to answer? [221]

The Court: Well, it can be answered yes or no.

Mr. Allen: Then I don't choose to answer.

The Court: Well, then it is the duty of the Court to admonish you that offering to bet upon the outcome of the trial in the progress of the trial before the Court is a contempt of court and——

Mr. Allen: I will stand on my constitutional rights if I have to answer.

The Court: Very well. Well, then I must admonish you that that is a contempt of court for which you can be punished and that you must desist from it. It is particularly dangerous if any such word might possibly come to the attention of the jury. It is also dangerous to make general comments about the town which may come to the attention of the jury. Surely, you must avoid that sort of thing. I am sure that you were not aware of any violation of ethics or conduct in offering to make such bets, and that is why we informed you that——

Mr. Allen: I didn't say that I offered it, and I offered to explain it, and you haven't saw fit to permit me that American privilege.

The Court: Why, you said you did not care to make a statement.

Mr. Allen: I said if I could explain it.

The Court: Very well; I am sorry. You said you [222] stood on your constitutional privilege and would not——

Mr. Allen: Constitutional privilege to make it and to be heard.

The Court: Well, yes; surely; if you wish to make a statement, you may do so.

Mr. Allen: I can make a complete statement explaining exactly what happened?

The Court: Very well.

Mr. Allen: You want me to make it under oath?

The Court: It is not necessary.

Mr. Allen: It will just take a minute, and I don't want to make a speech, but I want to make a statement.

I come here in June and bought this newspaper, and one of the first men I met was Mr. Roden, and, when I met Mr. Roden, I met him with Mrs. Monsen. I have been in this kind of business all my life, down here at Olympia, Washington, and on.

Mr. Roden told me what a fine man the former governor was, how he regretted being in a suit against—he was telling me; I wasn't telling him—how he regretted being in a suit against Mrs. Monsen, or the former governor's daughter, how the paper had favored him, how the governor had favored him, how the whole family had favored him, and he regretted it very much. There was no bet made. There was eventually, possibly. Now, he went on to tell me all this. Meantime I [223] had met the former governor.

The Court: Pardon me, Mr. Allen. Perhaps this

is not understood. The report that has come to the Court is your offering to bet here in Ketchikan during this session. Now, that, you say, you do not wish to state. I am merely admonishing you that——

Mr. Allen: I said, if I could make a statement, I will tell exactly what happened and how.

The Court: Well, all that we are concerned with is as to whether you are making these offers here in Ketchikan at the present time. That is all that the Court is concerned with.

Mr. Allen: I can't finish what I said with Mr. Roden?

The Court: Well, if it explains what you are doing now, yes.

Mr. Allen: Well, it does, because he is the man that I talked to.

So, I told Mr. Roden, I said—a day or two later—I was, you might say, in business with him, up to a point that I failed to have any confidence in him—I told him I wouldn't print his Journal any more, his Mining Journal, for a man that would make a statement that he didn't want to be in a suit against people that he loved and——

The Court: I think your statement is entirely out [224] of order. All that you were asked to state is whether or not you were making bets during the progress of this trial here in Ketchikan regarding the outcome of this suit, offering to make bets to the litigants or the parties representing the litigants. That is all that you are admonished that you should not do. Now, whether you have done it or not, I do not know.

Mr. Allen: Well, I am here for you now. You just go ahead and handle me like you have. I have respect for your court, totally. You handle me just like you want to handle me.

The Court: I must admonish you then, sir, that, if any repetition of offering to make such bets comes to the attention of the Court and if that is proven, that you will be punished for contempt of court.

Mr. Allen: Well, you can be assured that I will not make such a statement.

The Court: Very well. That is all we want to know.

Mr. Allen: Privately or otherwise.

The Court: That is all we want to know.

Mr. Faulkner: If the Court please, I didn't know about this. Mr. Nesbett just called my attention to it. But I want to state to the Court that I am very glad to have you admonish Mr. Allen or anybody else, because it is very embarrassing to me and to Mrs. Monsen to have anybody interfere [225] with the trial of this case outside of the trial. We are here to try the case, the two of us and nobody else. Nobody has any right in it at all or to try to go around bothering the plaintiffs. We haven't bothered them. We have the highest regard for them. It is unfortunate we have to try this case, but there is no animosity, and I don't want—I am sorry Mr. Allen did this; I am very sorry; and I certainly am glad that the Court called it to his attention, and, if there is anyone else on either side who steps out of line in this case anywhere, I want the Court to admonish

them, because we don't want to try a lawsuit that way. We want to try it only on the evidence.

The Court: Thank you, Mr. Faulkner; I am sure that you would not.

Will you call in the jury?

(Whereupon, the jury returned and all took their places in the jury box; whereupon the trial proceeded as follows:)

The Court: Do counsel stipulate that all the jury are present without the necessity of calling the roll?

Mr. Nesbett: Yes, your Honor.

Mr. Faulkner: Yes, your Honor.

The Court: You may proceed. Mr. Metcalf may be recalled to the stand.

(Whereupon, the witness Frank A. Metcalf resumed the [226] witness stand, and the Direct Examination by Mr. Nesbett was continued as follows:)

Mr. Nesbett: Your Honor, may I have the last question and answer read?

The Court Reporter: "Q. And, now, how were the receipts, that is, the cash receipts, from the operation of the ferry handled after the purchase in May of '51?" "A. They were directed right into the Treasurer's Office. It didn't go through my office at all." Mr. Faulkner asked for a repeat of the question, and Mr. Nesbett asked for a repeat of the answer, and then the next question commenced: "Q. Then, Mr. Metcalf, after the receipts"—there was adjournment thereafter.

(Testimony of Frank A. Metcalf.)

Q. (By Mr. Nesbett): Then, Mr. Metcalf, after monies had been received as a result of the operation of the ferry, they were given to the Territorial Treasurer, were they not? A. Yes.

Q. And into which Territorial fund did those monies go?

A. Those were earmarked for the Motor Fuel Tax Fund.

Q. Well, I mean monies from the receipts of the ferry; did they go into the Motor Fuel Tax Fund or to the General Fund?

A. They went into the General Fund.

Q. And were you or your purser, who operated the Ferry Chilkoot, able to draw on monies received as a result of [227] the operation of the ferry in order to pay the expenses of operation?

A. No, we couldn't. The only ones that could withdraw that money would be an act of the Legislature.

Q. And how long prior to the purchase of the ferry in May of 1951 had the Legislature met?

A. They met in the spring of that year.

Q. In the spring of 1951? A. Yes.

Q. And at the time the Legislature met in 1951 was it known to your office that you would be forced to purchase the Ferry Chilkoot in order to close that link in the highway system?

A. No; no, we didn't know it at that time.

Q. Then, when would the Legislature have met, after their adjournment in 1951, in the ordinary course of events? A. Two years later.

(Testimony of Frank A. Metcalf.)

Q. Would that be in 1953? A. 1953.

Q. Now, I believe you stated, did you not, that monies received from the two cents per gallon tax on gasoline went into the earmarked Motor Fuel Tax Fund; is that correct? A. Yes.

Q. And what was the purpose of that Motor Fuel Tax Fund [228] which was earmarked?

A. For building roads and harbor facilities.

Q. And then how was the Ferry Chilkoot paid for when it was purchased by the Territory in May of 1951?

A. It was paid out of that fund, the Motor Fuel Tax Fund.

Q. Out of the Motor Fuel Tax Fund?

A. Yes.

Q. And how were the operating expenses, after the purchase, met?

A. They were also met out of that same fund.

Q. But then is it your testimony that, although the earmarked Motor Fuel Tax Fund was used to pay the expenses, it was not possible for you or your purser to use any of the monies, received as receipts, for the services of the ferry?

A. No, we couldn't use them at all.

Q. And you were in the position, were you, of having to pay all the expenses of the ferry out of the earmarked Motor Fuel Tax Fund, but being unable to use any of the receipts to pay the crew and the operating expenses; is that right?

A. That is true.

Q. How long did that method of handling re-

(Testimony of Frank A. Metcalf.)

ceipts and disbursements in connection with the ferry continue to exist?

A. It went all through that first year. [229]

Q. Can you state, roughly, when you ceased to use that method?

A. We ceased to use that method immediately after we had established this special fund for using the returns of the ferry for its operation.

Q. Now, Mr. Metcalf, will you explain to the Court and the jury why a different method of handling the receipts and disbursements was devised by the Territorial Board of Road Commissioners?

A. Yes. We had a meeting, and I explained the situation from my standpoint and told them where I was using funds which I didn't think related to that on account of being collected from sections of the country which received no benefit from it, and I thought that, as all other boats that came up to this country the purser was furnished with a cash account to pay for longshoremen, pay his advance freight rates, and other expenses due at that time, that I thought that we ought to be able to use the funds that we were collecting from passenger and freight receipts to operate it, to buy the oil and to pay the men when it was due.

Q. I will ask you what, if you know, the requirements were in connection with the payment, for example, of longshoremen who handled the cargo on the ferry at the ports?

A. That is a Federal law, and we had to pay

(Testimony of Frank A. Metcalf.)

them as soon as [230] their time was up and they finished their work.

Q. Then, would it create a great deal of difficulty in attempting to handle the method by vouchers through the Auditor and then payment out of the Motor Fuel Tax Fund?

A. It would be weeks sometimes before they would get their pay.

Q. Now, in connection with payment of the members of the crew, it is a fact, is it not, that payment to those people of their wages, earned while working on the ferry, were governed by Federal regulations?

A. Yes; the Marine Law.

Q. Sir?

A. The Marine Law, as I understand it.

Q. Now, to state as an example, if one of the sailors, able-bodied seamen, quit his job on the ferry, what requirements would the Federal law lay down with respect to the payment of that man's wages?

A. He had to be paid immediately upon ceasing work.

Q. Now, you mentioned advance freight rates. Would you explain that just briefly for the Court and the jury and what difficulty you experienced in connection with the meeting of that requirement?

A. Well, often shipments came up from the States for Haines on the Alaska Steamship and were probably left at Juneau. We had to pay, oftentimes we had to pay, the freight [231] that far and collect it when we got to Haines.

Q. Then, in a situation of that sort would your

(Testimony of Frank A. Metcalf.)

purser of necessity be required to pay Alaska Steamship Company for the freight before he could receive the freight, place it on the ferry and carry it to its ultimate destination where he would collect for it? A. That happened several times.

Q. Now, did that result in considerable inconvenience and involve bookkeeping to try and run those matters through on vouchers through the various offices?

A. Yes. It held up the shipment of that freight often quite a number of days and weeks.

Q. Now, going back to the purchase of the Ferry Chilkoot, did you state that one, Mr. Sommers, owned that ferry prior to the purchase of it by the Territory? A. Yes.

Q. Did Mr. Sommers propose to operate that ferry between Haines and Juneau and other places during the '51 season as a private enterprise?

A. He tried it; yes.

Q. Will you explain what you mean when you say "He tried it"?

A. Well, he couldn't make it pay.

Q. Was any other agency or organization or company asked to attempt to take the ferry over and operate it as a private enterprise? [232]

A. That I do not know.

Q. I will ask you, isn't it a fact that you went to Alaska Steam and asked them, "Would you operate this ferry as a private enterprise?"

The Court: Counsel, aren't we going rather far

(Testimony of Frank A. Metcalf.)

afield? Again, can we limit the issues as far as possible to what is material and essential to be shown here? I do not find that to be material in this present inquiry.

Mr. Nesbett: Very well, your Honor.

Q. (By Mr. Nesbett): Now, do you recall the date that the method of handling the receipts and disbursements of the Ferry Chilkoot was changed?

A. Immediately after the action of the Board.

Q. And do you know the date of that action?

A. June 5, I believe.

Q. Of 1952? A. '52; yes.

Q. Now, can you tell the Court and the jury briefly what occurred at that meeting of the Territorial Board of Road Commissioners on June 5, 1952?

Mr. Faulkner: If the Court please, I think the record of that would be the best evidence.

The Court: I presume that minutes were kept of the Board meetings? A. Yes, sir. [233]

The Court: I presume such minutes would be the best evidence.

Q. (By Mr. Nesbett): Mr. Metcalf, I hand you this paper and ask you if you can identify it?

A. Yes. This is the minutes of the Territorial Board of Road Commissioners on June 5, 1952, 10:00 a.m.

Q. And in which office were those minutes prepared? A. They were prepared in my office.

Q. Is the signature to those minutes your signature? A. Yes, sir.

(Testimony of Frank A. Metcalf.)

Mr. Nesbett: Your Honor, I will offer this in evidence. (Handing proposed exhibit to defendant's counsel.) Do you have any objection?

Mr. Faulkner: No.

The Court: It may be admitted.

The Clerk: That will be Plaintiffs' Exhibit No. 9.

Q. (By Mr. Nesbett): Mr. Metcalf, is this paper I just handed you, which is Plaintiffs' Exhibit No. 9 now, a true copy of the minutes of the Board as reflected from the official records in the Highway Engineer's Office?

A. It is certified to, I think.

Mr. Nesbett: I will read this, your Honor. It is very short.

The Court: Very well. [234]

Mr. Nesbett: The heading is: "Territorial Board of Road Commissioners. June 5, 1952. 10:00 a.m. Present. Governor Gruening, Chairman; Mr. Henry Roden, Member; Mr. Frank A. Metcalf, Secretary. Also present: Mr. J. Gerald Williams, Attorney General."

"The problem of financing the M/V Chilkoot was discussed. It was pointed out that the fair and equitable method would be to redeposit the receipts from the ferry back into the Motor Fuel Tax Fund in order to defray part of the operating costs. Mr. Williams stated that there was no provision so far as he knew for this but would do further research on the matter. Mr. Roden felt that as long as every cent is accounted for, the ferry could be operated in part as

(Testimony of Frank A. Metcalf.)

a private enterprise and the purser could meet some of the expenses out of the receipts rather than turning the money back into the General Fund. This recommendation was unanimously approved by the Board. The Attorney General, Mr. Williams, offered no objections.

"A discussion as to the number of cars waiting in both Haines and Juneau led to a decision that in the public interest this backlog should be taken care of before the freight that was to go to Yakutat for Wallace Westfall is delivered. Mr. Westfall was called into the meeting and advised of this decision. It was pointed out that the ferry would maintain two full crews until the backlog is caught up [235] and the freight delivered to Yakutat in order to run continuously and better serve all concerned."

The rest of the minutes concerns only action taken by the Board in connection with the Homer Dock, and the Committee then resolved itself into another committee to handle other business. Unless Mr. Faulkner objects——

Mr. Faulkner: No.

The Court: Such references may be omitted.

Mr. Faulkner: No objection to its going in.

Mr. Nesbett: Signed "Respectfully submitted, Frank A. Metcalf, Secretary."

Q. (By Mr. Nesbett): Then, Mr. Metcalf, will you explain to the Court and the jury how then the receipts and disbursements in connection with the operation of this ferry were handled subsequent to that meeting of the Board?

(Testimony of Frank A. Metcalf.)

A. They were placed in a special account in B. M. Behrends Bank at the disposal of our purser.

Q. And who was the purser?

A. Bobby Coughlin.

Q. And who employed Mr. Coughlin to be purser?

A. I did; that is, I recommended to the Board that he be employed because he had twenty-five or thirty years' experience in actual purser's work.

Q. How long had you known Mr. Coughlin prior to his employment? [236]

A. Oh, thirty-odd years anyway.

Q. Now, Mr. Metcalf, tell the Court and the jury then how Mr. Coughlin handled the receipts and disbursements after June 5, 1952.

A. He collected them as they came due on the boat. Often the fares were not paid until they got aboard the boat, and often the freight was paid after it got aboard the boat, as far as the cars were concerned and the trucks.

Q. And to whom was the passenger fare and the freight cost paid? A. Paid to the purser.

Q. Mr. Coughlin? A. Mr. Coughlin.

Q. And what would Mr. Coughlin then do, after he had made a round trip to Haines, with the money he had received?

A. He deposited it directly into the bank.

Q. And did Mr. Coughlin at the end of each trip make any report or check in with anyone connected with the Board, the Territorial Board of Road Commissioners?

(Testimony of Frank A. Metcalf.)

A. It was his custom; yes.

Q. His custom to do what?

A. To report and to make his weekly report to the office.

Q. And where did he make the reports?

A. To my office. [237]

Q. And, usually, whom did he work with in your office in that connection?

A. With my administrative assistant.

Q. And is it your testimony that at the end of each round trip Mr. Coughlin would come in and make a complete report with your secretary as to monies taken and monies expended during that voyage?

A. No, not after each voyage. Sometimes it was the end of the month before he would come in with his reports.

Q. And after he had checked in with your office did he—rather, I will ask this—strike that question. Did you attempt to acquire a Territorial bookkeeper to handle the books with respect to this new method of disbursing receipts?

A. Yes. I contacted the Auditor.

Q. Who was the Auditor? A. Neil Moore.

Q. And what did you request of Mr. Moore?

A. I asked him to fix up a set of books that would comply completely with our operations, and he said he had no funds to do that with, and he refused my request.

No. 15052

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Transcript of Record
In Two Volumes

Volume II
(Pages 355 to 703)

Appeal from the District Court for the District of Alaska, First Division

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Q. Did you acquire a man to take care of the books and handle and recapitulate the reports of Mr. Coughlin so that the Board would know what was going on?

(Testimony of Frank A. Metcalf.)

A. I had to have a comprehensive set of books so I went to [238] a C.P.A. there in Juneau and asked him if he would fix me up a set of books. He bought the books and set them up the way they should go. I turned in a voucher for this work, and it was refused by the Auditor because he said that was his business, but he had refused to do it prior to that, and it wasn't until an action of the Territorial Legislature that he finally got paid for the work that I had been refused by the Auditor.

Q. When you say "he finally got paid," do you make reference to the bookkeeper you finally got?

A. Yes.

Q. Now, who was that man?

A. It was Chris Ehrendreich.

Q. And was he an accountant?

A. He is a certified public accountant with an office there in Juneau.

Q. He has an office in Juneau?

A. He has an office in Juneau.

Q. Now, do you recall how long after June 5th it was that you asked Mr. Moore to set you up a method of bookkeeping?

A. It was soon after the action of the Board. I wanted something to go by.

Q. You mean, shortly after June 5, 1952?

A. Yes; immediately after, you might say.

(Testimony of Frank A. Metcalf.)

Q. Did you tell Mr. Moore the problem you were faced with [239] and what you were doing?

A. Yes.

Q. Now, after that and after having been refused the set of books or a bookkeeper by Mr. Moore, did you request Mr. Moore to make periodic audits of the operation of the Chilkoot based upon the books kept by your C.P.A.?

A. Yes, I did.

Q. Did Mr. Moore make such audits or cause his office to make such audits?

A. He refused twice.

Q. Can you state why he refused?

A. His excuse was he had no funds for an audit.

Q. Now, Mr. Metcalf, how often then would Mr. Ehrendreich, your bookkeeper, make reports in connection with the operation of the Chilkoot to your office and others?

A. He worked directly with our purser, and often, when I was not there, he made his reports to Ehrendreich direct.

Q. And did you examine Mr. Ehrendreich's reports periodically? A. Yes.

Q. I will ask you whether or not Mr. Ehrendreich ever made any complaint in connection with the reports of the purser, Coughlin, or of any discrepancies in the method of handling the funds, to you? A. Never; no. [240]

Q. Now, did you testify previously that you went out of office as Territorial Highway Engineer on April 1, 1953? A. Yes.

Q. Was Mr. Ehrendreich keeping the books for

(Testimony of Frank A. Metcalf.)

the Board and in connection with the operation of the ferry up until the time you went out of office?

A. I think he was; yes.

Q. And then, up until the time you went out of office, is it your testimony that no complaint was ever made to you by Mr. Ehrendreich in connection with the method of handling the receipts and disbursements and the reports of the purser?

A. No, no complaints whatsoever.

Q. Now, inviting your attention again, Mr. Metcalf, to the front page of the publication of the Daily Alaska Empire of September 25, 1952, Plaintiffs' Exhibit 1, I will ask you whether or not any representative of the Daily Alaska Empire contacted you requesting information in connection with this fund prior to the date of publication?

A. Yes.

Q. And can you state who that person was?

A. The reporter from the Empire by the name of Daum.

Q. Would that be Mr. Jack Daum?

A. Yes.

Q. And what request did he make of you in connection with [241] the fund?

A. The first request was to see the minutes of the meeting authorizing that. I called in my administrative assistant who produced the minutes.

Q. Are those the minutes that were introduced as Plaintiffs' Exhibit 9?

A. The same ones; yes.

Q. All right. Go ahead.

(Testimony of Frank A. Metcalf.)

A. I went further into it. I explained the whole situation of why we were doing it, for the relief of not only the men that were working for us, in order to get their money when it was due, and to simplify the handling of the operations of the ferry. I went into it very thoroughly, explained the whole situation. I had nothing to hide and gave him every help I could.

Q. Did Mr. Jack Daum ever check back with you, after that meeting with you and prior to this publication, requesting any additional information?

A. No, sir, he didn't.

Q. Now, Mr. Metcalf, I will ask you whether or not you suffered any humiliation or mental pain or anguish after reading that front page of the September 25th publication?

A. I most certainly did.

Q. Will you explain just briefly to the Court and the jury what you mean when you say "I most certainly did"? [242]

A. Well, I had gone all out to give him all the information there was to be given. That information was twisted around and made to look like the admission of guilt, which there was no particle of foundation for.

Q. Now, I will ask you whether or not you suffered any damage to your reputation as a result of that publication as a whole or of the items on that page of which we have complained?

A. I most certainly did.

Q. Can you state briefly to the Court and the jury how you did suffer damage to your reputation?

(Testimony of Frank A. Metcalf.)

A. I don't see how it could be figured any other way. I have handled funds for mining companies of which I have had not only interest in but I have done work for, and I have never had my integrity questioned before, and I have lived in the Territory long enough to establish a reputation which I am very envious of.

Q. Can you state, Mr. Metcalf, whether or not you suffered any damage to your professional status as a civil and mining engineer by reason of that publication of September 25th?

A. I undoubtedly did. I feel a very personal situation which I had no way of refuting.

Q. How long did you—how old are you, Mr. Metcalf? A. Seventy-three. [243]

Q. And how long did you say you had been in the Territory? A. Forty-three years.

Q. Now, Mr. Metcalf, was any audit—I mean audit as such—made of the Chilkoot Ferry fund and the bank account by any Seattle firm during the period that you held office as Territorial Highway Engineer?

A. Yes. They made a general audit of all the departments of the Territory, including the Highway Engineer's Office and——

Q. Was that—pardon me.

A. ——and as a part of the Engineer's Office was the Chilkoot account, and that was audited along with the regular audit.

Q. But my question was—was that audit or any audit made of the Chilkoot Ferry fund before you went out of office on April 1, 1953?

(Testimony of Frank A. Metcalf.)

A. Yes. It was made prior to that.

Q. Was the audit as such made prior to your going out of office, or did the audit that was made cover the period that you held office or approximately that?

A. It covered the period, and the audit came out after my having left office.

Q. Then, I will put the question again. Was the audit, the actual work of auditing those books in connection with the Chilkoot fund, made while you were in the office and [244] still holding the official status of the Highway Engineer? A. Yes.

Q. Was it your testimony that the audit was completed after you left the office as Territorial Highway Engineer? A. Yes.

Q. And did these people conducting the audit ever contact you in connection with any matters regarding the Chilkoot fund? A. No.

Q. Well, were they in your office, Mr. Metcalf, prior to April 1, 1953?

A. Yes. They were in my office and made the audit from my books.

Q. They never asked you, or, rather, did they ever ask you about any matters in connection with the fund? A. No.

Q. Or the method of handling the books?

A. No.

Q. Or anything in connection with their audit duties? A. No.

Q. Now, Mr. Metcalf, will you look, or, rather, please let me have this copy of our Exhibit 1, Plain-

(Testimony of Frank A. Metcalf.)

tiffs' Exhibit 1, and I will ask you to look at this headline which reads in bold black type "Bare 'Special' Ferry Fund," and I will ask you whether or not that headline is a [245] true and correct statement of the status or situation existing on September 25, 1952? A. No, it is not.

Q. Will you state to the Court and the jury in what respect it is not a true and correct statement?

A. Well, that infers an uncovering of something which nobody knew anything about and something that was private or secret. There never was anything secret about the fund.

Q. Was there anything secret about the method of handling the receipts and disbursements?

A. No.

Q. Were those minutes, that I introduced as Exhibit 9, in your office from eight to five each and every working day, available to the inspection of the public? A. Yes, sir.

Q. And did you testify previously that you had explained your situation to Mr. Moore, the Auditor, shortly after June 5, 1952, asking assistance?

A. Yes.

Q. Then, is it a fact that Mr. Moore knew about the method shortly after June 5, 1952?

A. Yes, he did.

Q. Now, Mr. Metcalf, I ask you to look at the subheadline or smaller headline above the Chilkoot Ferry check, of which a photostat is reproduced on the front page, [246] "Reeve Raps Graft, Corruption," reading that in connection with the place-

(Testimony of Frank A. Metcalf.)

ment of the photostat of the check, and ask you if that particular piece of reporting reflects a true and correct situation with respect to the fund?

A. No, not at all, because that refers directly to that check, or the inference would be that that check was in connection with the words of "graft" and "corruption" and refer to the reproduction of that check.

Q. Now, you have read the article which actually accompanies this headline "Reeve Raps Graft, Corruption," have you not? A. Yes.

Q. That article which is headlined "Reeve Raps Graft, Corruption," as a matter of fact, has nothing whatever to do with the Chilkoot Ferry fund, does it? A. No, sir.

Q. Now, please look at this subheadline, which is to be read, apparently, in connection with the large headline, "Gruening, Metcalf, Roden Divert 'Chilkoot' Cash to Private Bank Account," and I will ask you whether or not that reflects a true and accurate statement in connection with the use and operation of the fund? A. It does not.

Q. Will you state in what respects it does not reflect [247] itself as a true and accurate statement?

A. Well, the word "Divert" refers more to a change of course, and the word "Private"—it was not private in any manner whatsoever.

Q. Is there any such thing as a public bank account in contrast to a private bank account, as they describe it here?

(Testimony of Frank A. Metcalf.)

A. I don't see how you could get a public bank account. That would be open to anybody.

Q. Well, as a matter of fact, where were the funds of the Territory kept for safekeeping, Mr. Metcalf?

A. In depositories all over the Territory.

Q. That would be in private banks, wouldn't it?

A. Private banks.

Q. Well, was—strike that. Now, I call your attention to the first paragraph under the heading which says "By Jack D. Daum," reading as follows: "To avoid paying Territorial money into the general fund as provided by law, Governor Gruening, Treasurer Roden and Highway Engineer Frank Metcalf have set up a 'special fund' at a Juneau bank, Territorial Auditor Neil Moore disclosed today." And I ask you whether or not that paragraph that I just read is a true and accurate statement of the situation of the fund as of September 25, 1952?

A. I didn't quite get your question. [248]

Q. Well—"To avoid paying Territorial money into the general fund as provided by law, Governor Gruening," etc.—does that portion of that paragraph, which is the lead-off of the explanation, apparently, of the three different types of headlines above it, is that phrase a true reflection of the actual status or the reasons of the Board for the establishment of the fund?

A. No, indeed; not in the least.

Q. Now, further along in that same print in

(Testimony of Frank A. Metcalf.)

connection with the same large bold headline and the two subheadlines there is the wording: "Into it have gone the receipts from the operation of the ferry which was purchased by the Territory in May, 1951, and there have been thousands of dollars of illegal receipts and disbursements recorded in the fund to date, Moore charged." I will ask you whether or not that statement is true and accurate. I invite your attention particularly to the wording "and there have been thousands of dollars of illegal receipts and disbursements recorded in the fund to date."

A. There was thousands of dollars deposited, but they were not legal—they were not illegal.

Q. Now, under even a fourth type of headline, or paragraph headline, you might say, entitled "Illegal Payments," I invite your attention to this wording: "The 'special fund,' which dates back to early last year, is in the [249] B. M. Behrends bank under the name 'Chilkoot Ferry—by Robert E. Coughlin.'" Now, the words, "The 'special fund,' which dates back to early last year," does that phrase—is that phrase true and accurate?

A. No.

Q. In what respect is it not true and accurate?

A. It was only a few months old.

Q. How old was the fund at the time this publication was made?

A. Oh, about three months.

Q. It had been established shortly after June 5, 1952, hadn't it? A. Yes.

(Testimony of Frank A. Metcalf.)

Q. This publication was in September of '52, was it not? A. Yes.

Q. Would that not make the fund approximately three and a half months old? A. Just about.

Q. Then, the words, "The 'special fund,' which dates back to early last year," referring to early in 1951, is false, is it not? A. Absolutely.

Q. Did you even own the ferry, the Territory, I mean, early in '51? A. No. [250]

Q. Now, Mr. Metcalf, I invite your attention to Paragraph 2, still dealing with the feature article, the wording as follows: "After learning of the unauthorized account late last month, Auditor Moore and Assistant Attorney General John Dimond ordered the bank to stop payment on all checks drawn against the account." Can you state whether or not that paragraph is true and correct?

A. No; because he knew about it earlier than the month before that.

Q. Now, who knew about it earlier?

A. Neil Moore, the Auditor.

Q. When did he know about the existence of the fund?

A. Immediately after the fund was created.

Q. And I will ask you whether or not, as a matter of fact, Auditor Moore and Assistant Attorney General John Dimond did close that account?

A. I don't think so.

Q. Now, Mr. Metcalf, in Paragraph 3 under the heading "Illegal Payments" in rather bold type the article reads as follows: "The case closely paral-

(Testimony of Frank A. Metcalf.)

lels that of Oscar Olson, former Territorial Treasurer who is now serving a prison term at McNeil's Island penitentiary for violating the law in the receipt and disbursement of public funds"; and ask you whether or not that paragraph is true and correct? [251] A. No parallelism whatsoever.

Q. Do you know why Oscar Olson was serving time at McNeil Island penitentiary as of September 25, 1952?

A. On account of embezzlement.

Q. Embezzlement of Territorial funds?

A. Territorial funds.

Q. By embezzlement do you mean the legal definition of taking funds and using them for his own personal purposes? A. Yes.

Q. Now, as a paragraph headline in the feature article, printed in rather bold type, in connection with this section of the article is the wording, the title wording, paragraph title wording, "Bookkeeping Trick." I am reading from the exhibit: "The special account, established and maintained without knowledge of the Territorial Auditor, was set up to enable the Highway Engineer, Frank Metcalf, to keep the ferry receipts out of the normal channels of Territorial finances, Moore declared. Metcalf labeled the move a 'trick of bookkeeping' which permits him to operate the ferry without depleting the funds given him by the Legislature to run his department." Now, I will ask you whether or not you made any statement to Mr. Daum or any other representative of the Daily Alaska Empire to the effect that the new method

(Testimony of Frank A. Metcalf.)

of handling the receipts and disbursements was a "trick of [252] bookkeeping"?

A. No, I never did.

Q. Are you positive that you never used that expression? A. No, I never did.

Q. Are you a bookkeeper?

A. No. That is the reason I tried to hire Neil Moore to set up the books for me because I was not a bookkeeper. I wouldn't know anything about a bookkeeping trick.

Q. Now, Mr. Metcalf, still in connection with the feature article under the banner headline "Bare 'Special' Ferry Fund" and under the subparagraph, subheading "Governor Absent," this paragraph appears, and I am reading from the exhibit: "When questioned by an Empire reporter, Metcalf produced a record of the June 6, 1951, meeting of the Board of Road Commissioners, attended by himself, Roden, Gruening and J. Gerald Williams, Territorial Attorney General"; and ask you whether or not the date mentioned in that paragraph is correct? A. Neither the day nor the year.

Q. The date that I am reading is "June 6, 1951." Will you state to the Court and the jury when the meeting was actually held? A. June 5, 1952.

Q. In the last paragraph on the inside column, still dealing with the feature account, there appears the following [253] wording referring to the minutes of that meeting of June 5, 1952, and reading from the exhibit now: "Then, the minutes disclose, on a motion by Roden, the board decided to set up

(Testimony of Frank A. Metcalf.)

the 'special account' in a private bank. There the money could be deposited and spent without the knowledge or approval of the auditor. Such an account was opened at Behrends bank, under the name 'Robert E. Coughlin' instead of in the name of the board or of the highway engineer." Now, directing your attention to the words again " 'special account' in a private bank." Does that phrase reflect truthfully and accurately the acts and reasons of the Board in connection with the fund?

A. No, it does not.

Q. Well, is "special account" at all applicable to this particular type fund?

Mr. Faulkner: If the Court please, I think this is really arguing with the witness and calling for a conclusion, for an interpretation. Mr. Metcalf said a few minutes ago it was a special account. Now, it speaks for itself. He has already testified it was. He used those words. And, of course, it appears on its face what it was.

The Court: I find the last question to be argumentative. The objection is sustained to the last question.

Q. (By Mr. Nesbett): I will ask you whether or not then, Mr. Metcalf, the wording in that same paragraph, "There [254] the money could be deposited and spent without the knowledge or approval of the auditor"—and ask you whether or not that was the intent of the Board in establishing the fund?

A. That was not the intent in any manner whatsoever.

(Testimony of Frank A. Metcalf.)

Q. Now, I am still dealing with the wording of that paragraph, where it says as follows: "Such an account was opened at Behrends bank, under the name 'Robert E. Coughlin' instead of in the name of the Board or of the highway engineer." Is that a true and accurate statement?

A. No, it is not.

Q. And in what respect was it false?

A. It was opened in the name of the Chilkoot Ferry.

Q. Was there any other title to the fund?

A. No.

Q. "Chilkoot Ferry?"

A. The "Chilkoot Ferry Fund" is what it was.

Q. The "Chilkoot Ferry Fund"; and was there a designation of a person to have access to that fund? A. The purser on that boat.

Q. Who was the purser?

A. Robert Coughlin at the time.

Q. I will ask you whether or not the true title of the fund then was "Chilkoot Ferry By Robert E. Coughlin"? A. Yes. [255]

Q. Now, did you have authority to write any checks on that fund? A. No, sir.

Q. Did Treasurer Roden, even, have authority to write checks on that fund? A. No.

Q. Did Governor Gruening have authority to write checks on that fund? A. No, sir.

Q. Then, is it a fact that the only person authorized to write checks on that fund was Robert E. Coughlin?

(Testimony of Frank A. Metcalf.)

A. If it happened to be that Robert E. Coughlin was the purser at that time, and, if we got another purser, he would have had the authority.

Q. Now, inviting your attention to this photostat of the check reproduced on the front page of the edition of September 25th, payable to Steve Larsson Homer in the amount of $398.04, can you state to the Court and the jury what that payment represented?

A. It represented an overtime which he claimed he had coming.

Q. The check is dated 20 August, 1952. I will ask you if you recall how long Mr. Steve Larsson Homer was employed during the year 1952 in connection with the Chilkoot operation? [256]

A. I think he was separated from the ferry about that same time.

Q. Was this check given to Mr. Homer in your office, or do you recall?

A. It was given to him in my office as a final payment.

Q. Final payment for what?

A. His services on the Chilkoot Ferry.

Q. Did his services terminate as of the date or approximately as of the date of this check?

A. Of the date of that check; yes.

Q. And who was responsible for terminating Mr. Homer's services? A. The purser.

Q. Mr. Coughlin? A. Mr. Coughlin.

Q. Were you present when that was done?

(Testimony of Frank A. Metcalf.)

A. I was there when the check was handed to him.

Q. Were you present when Mr. Coughlin discharged Mr. Homer?

A. He said—yes—he said, "We are through with you now."

Q. Mr. Metcalf, again calling your attention to an article appearing on the front page of the September 25th publication with the headline "Roden, Metcalf Say 'Nothing Crooked' Here"—Nothing crooked here. I will ask you whether or not you made a statement to Mr. Daum or any other representative of the Daily Alaska Empire to the [257] effect that "Nothing is crooked here"?

A. No, I did not.

Q. Are you positive?

A. I am positive; yes.

Q. Mr. Metcalf, I invite your attention to additional wording under that headline "Roden, Metcalf Say 'Nothing Crooked' Here," to wording to the effect that receipts from the operation of the ferry could not legally be used to pay ferry expenses. Is that a strictly true and accurate statement of the situation? A. No, it is not.

Q. Upon whose advice, with respect to the legality of the fund, were you depending?

A. On the advice of the Attorney General.

Q. Now, Mr. Metcalf, reading the last paragraph of this article insofar as the column on Page 1 is concerned, which reads as follows: "If the law were disregarded and the receipts poured back into

(Testimony of Frank A. Metcalf.)

the ferry, the act would come to the attention of the Auditor of Alaska, who is the Territory's watchdog on money matters." I will ask you whether or not that paragraph makes any sense to you?

A. Not a particle; because he already knew it.

Q. Does the paragraph in and of itself, by the very wording, read carefully as follows: "If the law were disregarded [258] and the receipts poured back into the ferry, the act would come to the attention of the Auditor of Alaska, who is the Territory's watchdog on money matters."—Does it convey any thought or sense of continuity, in connection with the article as a whole, to you?

A. Not a bit.

Q. Inviting your attention, Mr. Metcalf, to the editorial entitled "Start Talking, Boys" and underneath it "(An Editorial)," what was your first reaction after reading that article in connection with the headline "Start Talking, Boys"?

A. Well, it is the first time I have ever seen an editorial on the first page of that or any other Empire, and then, referring to three elderly gentlemen as "Boys," it wasn't very complimentary.

Q. Now, in the next to the last paragraph of that editorial entitled "Start Talking, Boys" there is a paragraph that reads as follows, the wording is as follows: "But this is a case where Gruening, Roden and Metcalf will have to stand on their own feet and explain to Alaskans whether the Territorial law is applicable to some and not to others or whether they acted in complete defiance to the law

(Testimony of Frank A. Metcalf.)

in the belief they would not be caught." And I ask you whether that is a true, accurate and fair statement of the situation? [259]

A. Not the slightest.

Q. I am inviting your attention particularly to the last five words, that "they would not be caught." What was your reaction to that wording?

A. Implies that we had been using funds illegally, which we were not.

Q. The last paragraph reads as follows: "Oscar Olson sits today in his prison cell, dreaming of the days when he thought Territorial laws were only for the underlings." What was your reaction when you read that last paragraph of this editorial?

A. Well, that was just about the last straw.

Q. Why?

A. After having gone through all the rest of it, it finally compares us to occupants of a prison cell.

Q. Mr. Metcalf, do you know where Mr. Robert E. Coughlin, who was purser of the Chilkoot, is today? A. He died a few weeks ago.

Q. In Juneau? A. Yes.

Mr. Nesbett: No further questions, may it please the Court.

(Whereupon, Court recessed for ten minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; whereupon the trial [260] proceeded as follows:)

(Testimony of Frank A. Metcalf.)

Cross-Examination

By Mr. Faulkner:

Q. Mr. Metcalf, you said in answer to the last question asked you that Mr. Coughlin, the purser of the ferry who had this account in his name, died a few weeks ago? A. Yes.

Q. That was about three years after this publication was made, was it? A. Yes.

Q. Did you at any time in that period of three years make any attempt to take his deposition to bring here to the jury? A. No; no, I didn't.

Q. Now, do you know how the ferry account stands, that special account, today?

A. I haven't seen it; no.

Q. Well, do you know anything about the records, about the receipts and disbursements, just what the money was disbursed for?

A. They are all in the—in our auditor's office, I imagine.

Q. Which auditor?

A. In the Ehrendreich office.

Q. Well, did you make any attempt to bring him here? [261] A. No.

Q. What records does he have?

A. He has the books that were opened and used during the operation of the ferry.

Q. When were they given to him; do you know?

A. Soon after Neil Moore refused to do anything with it.

(Testimony of Frank A. Metcalf.)

Q. And he made—how many reports did he make on that?

A. I don't know offhand how many there were.

Q. Well, did he make more than two?

A. I couldn't say.

Q. Well, you don't know. And you don't know as to just how that account stands today, or how it stood at the end of 1952?

A. No; I didn't see it.

Q. You have made no examination of it for the purpose of this case; have you? A. No.

Q. Now, Mr. Metcalf, I will ask you if Mr. Ehrendreich didn't become concerned with these ferry books sometime after this publication appeared? Is that right or not?

A. Well, I wouldn't say to that. It was during that—1952.

Q. Yes; in 1952 he came into it. Do you know when in 1952? A. Offhand, I don't.

Q. Do you know anything about any of his audits or examination of these accounts? [262]

A. No.

Q. Well, I will ask you if you know of an audit of the ferry, special ferry account made by Mr. Ehrendreich on October 10, 1952? Did you ever see that?

A. I think there is a copy of that in my office, or was.

The Court: Counsel, I do not wish to preclude you from going into this audit if you deem it material. It was gone into on the cross-examination of

(Testimony of Frank A. Metcalf.)

Neil Moore, in the deposition, by both sides without objection. But do you feel that anything which appeared, which was done, or an audit made after the publication of this account might be material?

Mr. Faulkner: Yes, Your Honor; yes. That reflects the state of the account up to this date. The purpose of this—the plaintiffs claim that the publication was false, and they claim there was no—I mean, they claim there was no shortage of funds. Now, they also claim it was a matter of convenience and expediency to handle the Territorial funds in that way, and I take it that no one would complain if everything went all right, if they had not done it according to law or violated the Territorial statutes, but here there is a loss of money. I think it is an entirely different thing, and I think we have a right to show what happened to these funds and that there was a considerable loss.

The Court: Would you have that right, Mr. Faulkner, unless it was shown that the publisher of the Daily Alaska [263] Empire or members of its staff knew of such shortage at the time of the publication?

Mr. Faulkner: Oh, yes.

The Court: Must that be——

Mr. Faulkner: Yes, sir. That is very well-settled, that the truth in a libel case is admissible whenever and wherever found, and it doesn't make any difference where. If a person says, if a paper publishes, that a man committed manslaughter, and he can't prove it for a week, but it developed that they

(Testimony of Frank A. Metcalf.)

found it out a week later, it is still a defense if the man should sue you for libel because they didn't know it. That would be too farfetched. The truth—that is one of the fundamental principles of the law of libel, that truth is a defense whenever and wherever found.

The Court: Well, but now here is this point. Supposing, under the evidence here, this account being handled by the purser, supposing he came up with a shortage of funds, would the plaintiffs here be liable for such shortage?

Mr. Faulkner: Yes, your Honor.

The Court: Criminally liable?

Mr. Faulkner: He was their agent.

The Court: Criminally liable?

Mr. Faulkner: I think so; because they would be liable under that statute which they did not obey, and their possession; or his possession of the money is their possession [264] under the law.

The Court: Which would be criminal liability only upon the theory of an accessory, would it not? The relation of master and servant has no relation to criminal law. It must be shown to be an accessory.

Mr. Faulkner: Well, where here the Territorial officials, who say, "We are not going to obey the law; we are going to change it; we are going to use some other system; we are not obeying the law"——

Mr. Nesbett: Your Honor; pardon me. I think, your Honor, if Mr. Faulkner is going to make any

(Testimony of Frank A. Metcalf.)

speeches, it should be out of the presence of the jury.

The Court: Well, I find nothing——

Mr. Nesbett: I agree that I don't think it is material, but where the error commenced, as your Honor very aptly pointed out, was in the direct examination, or cross-examination of Neil Moore by Mr. Faulkner and we both stipulating that it could all go in.

The Court: Yes.

Mr. Nesbett: That point, insofar as the front page of the paper is concerned, they are not charged with being responsible for any shortage of funds in any manner whatsoever. This is completely irrelevant even if there was a discrepancy.

The Court: Well, that is what I have been debating, [265] but the other testimony went in without objection by stipulation, and that is why we could not hold it to be irrelevant. I think, having gone into it, that defendant then should not be precluded from pursuing the inquiry further, but, whether it is relevant then, well, we will try and instruct the jury whether the matter is relevant and they may consider such subject. My only thought is in interrupting you, counsel, that, if the matter is not relevant, we do not desire to take up needless time with it, but, if you feel that it is, you may pursue the inquiry.

Mr. Faulkner: Oh, I certainly do, your Honor, and I have these exhibits here, and I think that is very material, very material in this case.

(Testimony of Frank A. Metcalf.)

Q. (By Mr. Faulkner): Mr. Metcalf, I will ask you if you know of an audit made by Mr.—two audits made by Mr. Ehrendreich on October 10, 1952, the same day, covering this ferry account up to September 30, 1952? Do you know of that?

A. I don't know; I don't remember of having seen it; no.

Q. Well, supposing I show you this and ask if you recognize those two audits?

A. I don't remember having seen it.

Q. Do you remember having seen either one of them? A. No, sir.

Q. They are addressed to you and filed in your office; weren't [266] they—addressed to the Board and filed in your office as Highway Engineer?

A. Highway Engineer Irving Reed.

Q. No. But look at the date of the audit.

A. October 10, 1952.

Q. And the signature?

Mr. Nesbett: When was the audit completed and filed? That is the date.

Mr. Kay: He said '52.

Mr. Nesbett: When it was filed in the office?

The Court: He had referred to the date October 10, 1952.

Mr. Faulkner: Yes.

A. It was probably on file in my office; yes.

Q. (By Mr. Faulkner): You think it was on file?

A. Yes. It is on file in my office because it is sworn to by——

(Testimony of Frank A. Metcalf.)

Q. Certified? A. Certified by the——

Mr. Faulkner: We would like to offer these two, this exhibit, as the Defendant's Exhibit No. ...C?

The Clerk: C.

Mr. Faulkner: In connection with the cross-examination——

Mr. Nesbett: I object. I believe in the first [267] place, as I said before, it is irrelevant to this case. There is no charge—we are not trying this case on a question of whether or not there was or was not a small shortage or on any audit, and, furthermore, the witness, Frank Metcalf, says he does not recognize it; he is not familiar with it; therefore, how can it be admitted?

Mr. Faulkner: Your Honor, I have some questions about it.

Mr. Nesbett: If they can identify it themselves when they put their case on, why, that is one thing; but the witness said he is not familiar with it, doesn't recall having seen it, although he admits that it may be in the office he used to occupy. It is not enough to permit the introduction.

The Court: I fear that it has not been sufficiently identified.

Mr. Faulkner: It doesn't need to be identified, your Honor. The introduction is then under Rule 44 of the Rules of Civil Procedure. I think that is the rule. That is the rule.

The Court: A certified copy of public records?

Mr. Faulkner: A certified copy of public records, authenticated by the Secretary of Alaska.

(Testimony of Frank A. Metcalf.)

The Court: It may be admitted under that rule. However, I think that the jury should be instructed now that [268] this audit is not permitted to be introduced as in any way bearing upon any criminal responsibility of the officials who are the plaintiffs in this suit for any possible shortage in the accounts of the purser, Mr. Coughlin, for which they would not be responsible. They would be responsible to account for such funds as their employee, the Board's employee, but not for any alleged crime or wrongful criminal act, and it is only introduced for the purpose of bearing upon the question of whether or not the publication here complained of was true or false.

Mr. Faulkner: That is true, your Honor, and I agree with your Honor.

The Court: Very well.

Mr. Faulkner: It is not admissible for that purpose at all, and we are not charging that, but we are offering it for the purpose of showing that these plaintiffs did not follow the law in the setting up of this fund, and what happened to the funds, as I stated, and for the purpose of arguing the matter if there wasn't a loss of funds. I will just take this a minute and I will bring it back.

Q. (By Mr. Faulkner): Now, Mr. Metcalf——

Mr. Nesbett: Pardon me. Was that Exhibit C or D?

The Clerk: That is C.

Q. (By Mr. Faulkner): Mr. Metcalf, these two reports I show you by Mr. Ehrendreich, in one of

(Testimony of Frank A. Metcalf.)

them, one of them is [269] marked Short Form for Publication—"Short Statement for Publication," and the other is not so labeled. Now, the other one, Mr. Ehrendreich says: "We were unable to verify the $4,106.07——"

Mr. Nesbett: Where is that?

Mr. Faulkner: That is on the first page of the second one; right down below there.

Q. (By Mr. Faukner): "——unable to verify the $4,106.07 alleged to have been paid for advances; however we have no reason to doubt that they had actually been paid as claimed." Do you remember Mr. Ehrendreich going into that matter with you?

A. No; he didn't go into it with me.

Q. Well, as a matter of fact—let me go back—didn't you go to Mr. Ehrendreich's office with Mr. Coughlin and request him to audit these ferry books after this publication was made?

A. I don't remember of going there with Mr. Coughlin. I remember requesting an audit by Mr. Ehrendreich.

Q. And this is the audit that was made?

A. I imagine that is the one.

Q. Now, then do you remember here that he found that there were certain checks—that is on the bottom of the page there—No. 16—no—there were three checks in the sum of $100.00 each issued to—yes; that is on the second page— [270] issued to Mr. Coughlin, Checks Nos. 8, 13 and 15, issued in 1952 for $100.00 each, and there was no record of their having been paid back, and that he relied on

(Testimony of Frank A. Metcalf.)

Mr. Coughlin's statement that they had; do you remember that, going over that with Mr. Ehrendreich? A. No, I don't.

Q. Do you remember Mr. Ehrendreich reported —at the bottom of the first page—that there were two checks issued to Steve Larsson Homer—no—one in the sum of $100.00 to Steve Larsson Homer under the caption of "Personal Loan," and one for $107.06 issued to the Moore Hotel for Steve Larsson Homer's account, which funds had not been paid back into the ferry account?

A. I think that second check was during the time when we were in Seattle on the reconstruction of the ferry boat.

Q. When was that?

A. That was in the spring of '52.

Q. And those two checks were issued down there? Now, Mr. Ehrendreich found there was no record of their having been paid back? A. No.

Q. In this report—well, I don't need to ask you that question. Now, Mr. Metcalf, this second report here is labeled "Short Statement for Publication," and that report does not contain any reference to not being able [271] to reconcile $4,106.00, and it doesn't contain any reference to these checks which were issued and which Coughlin had claimed were paid back, but there was no record of them. Now, can you tell the Court and jury why you had two made on the same day, one marked "Statement for Publication" and the other not marked that way? Do you recall that?

(Testimony of Frank A. Metcalf.)

A. No; I don't recall why there were two.

Q. But one does contain that evidence or that statement about the shortages, and the other one doesn't. The one that was published here in the Juneau Independent a few days later was the "Short Statement for Publication"; do you remember that?

A. I remember seeing it in the paper but I don't remember.

Q. Now, Mr. Metcalf, I will ask you this. Mr. Coughlin had this account set up in the name, I think you said, "Chilkoot Ferry by Robert E. Coughlin"; is that correct? A. Yes.

Q. And Mr. Coughlin was the only one with authority to issue checks? A. That is true.

Q. Now, did you ever consider what would happen to that fund if Mr. Coughlin died; how did you expect to get it?

A. Well, as I made the statement a while ago, it was left open for our purser. [272]

Q. Yes; but you didn't have anything about a purser on the account?

A. Well, I don't think Robert Coughlin's name was on the account.

Q. Did you bring the ledger sheets here from the bank? A. No.

Q. The bank reports that come monthly?

A. No.

Q. Well, why didn't you bring those, Mr. Metcalf? A. I wasn't asked to bring them.

(Testimony of Frank A. Metcalf.)

Q. Well, what became of the—this report of Mr. Ehrendreich's, Defendant's Exhibit C, shows fifty-four checks were issued on this fund—do you know where those checks are? A. No, I do not.

Q. Does anybody know?

A. They were searched for but were unable to find.

Q. Well, where would they be put? What has happened to them?

A. When the office was moved from the Federal Building to the new Territorial Building, the books and everything was packed up in separate boxes and taken over to the new building and opened over there, and they might have been misplaced in the move.

Q. You were there at the time of the move, weren't you? A. No, I was not. [273]

Q. Oh, you were not there? A. No, sir.

Q. But did you ever look there for them?

A. No; I never had an occasion to look for them.

Q. Did you ever look for the bank statements?

A. I looked for the checks, but they had been reported to me that they had been looked for before and were unable to find.

Q. And they were not in the Treasurer's Office? You looked there?

A. They weren't in the Treasurer's Office.

Q. And you didn't look for the bank statements?

A. No, I didn't.

Q. Did you ever examine the ledger sheets at the bank? A. No.

(Testimony of Frank A. Metcalf.)

Q. So that, as a matter of fact, this account was set up just exactly as the check showed, wasn't it —Chilkoot Ferry by Robert E. Coughlin?

A. Yes.

Q. And those checks have all disappeared except the one that Steve Homer had, which was not cashed; is that right?

A. I can't account for it at all.

Q. All right. Now, you said here this morning something about your reason for setting up this ferry fund in the [274] way you did, and you said, I think, that the Territory purchased the ferry in the spring of 1951, June of 1951, and what was your reason for not putting the operating revenue in the Motor Fuel Tax Fund? What did you say that was?

A. I didn't quite get the question.

Q. Well, you had this Motor Fuel Tax Fund in your charge, didn't you? A. Yes.

Q. That was a special fund that was paid over to your department, the Highway Engineer?

A. Yes.

Q. Now, what goes into that fund?

A. Receipts from motor—from gasoline sales.

Q. What else? A. Motor fuel sales.

Q. What else goes into it?

A. 2% of the total sales.

Q. Well, is that all?

A. Well, there was the returns from licenses, drivers' licenses. That went in there, too.

Q. Did you have any fines on the highway?

A. No; no fines.

(Testimony of Frank A. Metcalf.)

Q. But the licenses do go in?

A. Just the drivers' licenses only; yes. [275]

Q. And, then, that fund comes from all over the Territory? A. Yes.

Q. All the divisions; and it is all put in one general fund? A. Yes.

Q. That is right. Now, when you spend money out of that fund, you don't spend it in any particular proportion, do you?

A. Well, it was aimed to be done that way.

Q. Yes; but it is never done very accurately that way, is it?

A. Well, it is left entirely to the judgment of the Engineer.

Q. Your office report for 1951 and '52 will show in what divisions you expended monies?

A. Yes.

Q. And for what purpose; is that right?

A. Yes.

Mr. Nesbett: Now, your Honor, not to try and stop anything that might be material, but it seems as though we are digressing again, and I can't see any relevancy whatsoever in going into this matter.

The Court: It is not proper cross-examination either, is it, counsel?

Mr. Faulkner: The witness has told us why he set up this ferry fund, why he set it up, went into great length. Now, I want to cross-examine him a little bit on that—why he couldn't do it as the law requires. [276]

The Court: Well, possibly. You may proceed.

(Testimony of Frank A. Metcalf.)

Mr. Nesbett: What does that have to do, your Honor, with what he did in the way of disbursing these taxes?

The Court: The point raised by counsel is that he was asked concerning why he set up this fund, and he has the right to cross-examine on that point, and we cannot preclude him from doing so—if that is the purpose of your cross-examination.

Mr. Faulkner: I don't quite understand what the witness was driving at this morning, and I want to try to clarify it. I don't believe the jury does.

Q. (By Mr. Faulkner): Mr. Metcalf, you said that you didn't want to pay the operating expenses of the ferry out of this Motor Fuel Tax Fund, which is in your charge; is that right?

A. Yes. I realized that it was more than percentage would allow.

Q. Well, what percentage?

A. Percentage of the amount received.

Q. Well, what were those payments for? I might, perhaps at this point, I might ask if this is your report for the year 1951 and '52 as Highway Engineer? A. Yes.

Mr. Faulkner: We will offer that in evidence.

The Court: For what purpose, counsel? [277]

Mr. Faulkner: I want to question him about this fund and why it was that he had to set it up that way.

Mr. Nesbett: It would only be confusing to the jury, your Honor, and it has no relevancy so far.

(Testimony of Frank A. Metcalf.)

The Court: It is not for the purpose of impeachment in any way?

Mr. Faulkner: Oh, no. I am cross-examining him on it. I want to find out what—I want to get this clear as to why they set up this fund, and I want to show the figures in this report.

The Court: Well, is the fund mentioned in the report, this Chilkoot Ferry Fund, mentioned in the report?

Mr. Faulkner: Yes, sir; yes.

The Court: Oh, it is. Very well. For that purpose then it may be admitted.

Mr. Faulkner: All right. I will offer this in evidence as Defendant's Exhibit D.

The Clerk: The exhibit is so marked.

Q. (By Mr. Faulkner): Mr. Metcalf, in connection with your testimony this morning I notice that you said that you didn't want to use the Motor Fuel Tax money in connection with the operation of the Chilkoot; is that right? A. Yes.

Q. Now, in your report here for 1951 and '52 on Page 11 shows operating revenue of the Chilkoot $32,746.12, and on Page [278] 13 of the report you have under the heading "Expenditures on Roads, Harbor and Water Facilities," "Chilkoot Ferry gross expenditures $140,505.58." Now, I want to ask you this. Where did the remainder of that item of expenditures come from? You have there receipts of thirty-two thousand something—I think I have it correct—and expenditures of one hundred and

(Testimony of Frank A. Metcalf.)

forty thousand. Now—yes, $32,746—now, where did that remainder come from?

A. Well, that was due partly to the improvements that we had to make on the boat, and that improvement came out of the Motor Fuel Tax.

Q. And I suppose you have the purchase price there somewheres?

A. We had to take it from the Motor Fuel Tax in order to repair the boat.

Q. So that all this amount, this difference between one hundred and forty thousand, five hundred, and thirty-two thousand, seven hundred, did come out of the Motor Fuel Tax Fund?

A. It did; yes.

Q. Now, Mr. Metcalf, there wasn't very much money earned by the Chilkoot Ferry in that time, was there? Does that represent, that figure I read you, that thirty-two thousand, seven hundred and forty-six, represent the total earnings? **[279]**

A. No. We had to make extensive repairs on the boat in order to meet the requirements of the Coast Guard. In fact we had to put on a whole new bottom and other repairs besides.

Q. Now, do you know anything about the method that Mr. Coughlin had of handling the funds with reference to payment of expenses, in paying the expenses of, for instance, the board of the crew, the wages of the crew; do you know what method he used there?

A. No; except on one or two instances He wrote himself a check and took the money and used that

(Testimony of Frank A. Metcalf.)

and paid off his men in cash. That happened to happen in two or three instances, but I don't know as that was his general method.

Q. In a good many instances he handled cash?

A. Sometimes.

Q. And you don't know today just exactly how the fund stands, do you? A. No, I don't.

Q. Do you know when the fund was closed at Behrends Bank?

A. No; I don't know that it was closed entirely.

Q. Well, when Mr. Moore said that he and John Dimond went down there and told them to close it or something, do you know what was done with it?

A. No, I don't. [280]

Q. Well, do you know how the expenses were handled after that? That, I think, was August 25, 1952.

A. The suspension of the operations took place very shortly after that.

Q. After August 25th? A. Yes.

Q. Well, Mr. Ehrendreich's report shows you made several voyages after that? A. Yes.

Q. How did you account for the funds then, after that, after it was frozen or turned over to the Treasurer or whatever was done with it?

A. That was done entirely through the purser.

Q. Well, you mean, then the purser handled these funds in cash? A. Yes.

Q. For instance, if the agent at Haines would send him down some checks, freight money and

(Testimony of Frank A. Metcalf.)

passenger money, made payable to the Chilkoot Ferry, what would become of them?

A. The cash was used as payment of running expenses at the time.

Q. And he would cash these checks?

A. Yes.

Q. And do you know where he kept the cash?

A. No; except in the bank. [281]

Q. What bank? A. B. M. Behrends Bank.

Q. Well, but this account, this particular account had been closed August 25th, as the testimony shows; isn't that right?

A. I don't know that it was closed.

Q. You don't know that it was closed? Did you ever look at the ledger sheets there? A. No.

Q. You didn't even make any effort to bring those with you? A. No.

Q. Now, when Mr. Daum came to you to inquire about the minutes of the Board of Road Comissioners, where you set up, authorized the setting up, of this fund, putting the funds in the hands of Mr. Coughlin, you gave him a copy of the minutes, did you?

A. I didn't give him a copy. I let him copy it at my desk.

Q. You let him read it?

A. I let him read it, and then I think he took some notes on it.

Q. And did you explain it to him quite thoroughly? A. Yes.

Q. Your reasons for doing that? A. Yes.

(Testimony of Frank A. Metcalf.)

Q. And he published that, didn't he?

A. Not the way they were given to him. [282]

Q. Well, of course he doesn't get your exact language; no reporter ever does unless he—unless you write it out for him.

Mr. Nesbett: Well, your Honor, I don't know—that isn't proper to talk that way. You are supposed to ask questions; that is the only method of cross-examination.

The Court: The objection is sustained.

Mr. Faulkner: All right. Pardon me, your Honor.

The Court: Yes.

Q. (By Mr. Faulkner): Mr. Metcalf, when Mr. Daum published these articles in the paper that are complained of, he gives under one headline here, "Roden, Metcalf Say 'Nothing Crooked' Here," with your picture, a very good picture of you; isn't that substantially correct? You said the Board decided to pay $30,000.00 for the boat; isn't that right? A. In the neighborhood of that.

Q. And you directed the setting up of this fund, didn't you? A. Yes.

Q. And told him how the ferry was to be operated? A. Yes.

Q. And the language he uses here is substantially your language, isn't it? A. No.

Q. What was it that isn't your language? You said, I think, [283] that you didn't say that it was a bookkeeping trick? A. No.

Mr. Nesbett: I ask that the witness be shown the

(Testimony of Frank A. Metcalf.)

exhibit if he is going to have to state what language in the article is not his own.

Mr. Faulkner: I was just asking him a couple of questions, and I will——

The Court: I think it is proper cross-examination.

Q. (By Mr. Faulkner): You said, I think, in answer to Mr. Nesbett's question, that you did not say that this was set up as a bookkeeping trick?

A. No, I did not.

Q. Now, do you know whether Mr. Daum took any notes of your conversation? Did he do any writing there?

A. I think he did, but I am not sure.

Q. And you said here—I don't think this was asked you, if in the article you said the repairs amounted to $29,000; is that substantially correct?

A. Repairs to the boat?

Q. Yes.

A. In the neighborhood of that. I don't know the exact amount.

Mr. Faulkner: If the Court will pardon me just a minute.

Q. (By Mr. Faulkner): And I ask again, Mr. Metcalf, you [284] don't know exactly when Mr. Ehrendreich was asked to keep track of these accounts?

A. Yes. I don't know the exact date but I know it was early in '52.

Q. What authority did he have with reference to the account, if any? A. What authority?

Q. Yes. A. He was given the books.

(Testimony of Frank A. Metcalf.)

Q. To keep the books? A. Yes.

Q. And he had nothing to do with issuing the checks, though, or disbursements? A. No.

Q. And, as a matter of fact, don't you think that occurred sometime after, you got him to keep books sometime after you had him make this audit October 10, 1952?

A. There were none prior to that.

Q. Well, if Mr. Ehrendreich says that he comes into this thing then, at that time, would that be correct or not?

A. He came into it when he set up this set of books for me.

Q. When was that?

A. That was soon after June 5th.

Q. And that was some time, quite a while then, before he made the audit? [285] A. Yes.

Q. Well, just what was the purpose of getting these audits from him? He was keeping the books, was he? A. Yes.

Q. And you don't know why you had these two audits made October 10, 1952?

A. Well, it was near the close of the season, and I had my Biennial report to get out.

Q. Well, I mean, but why did you have two made? You don't know that, you said.

A. No, I don't know why there was two made.

Q. Mr. Metcalf, I might ask you this question: Do you—you didn't get along very well with Mr. Moore, did you?

A. Not later in the term, I didn't.

(Testimony of Frank A. Metcalf.)

Q. Well, for quite a long time you didn't; you didn't like him, did you?

A. Oh, I got along with him, yes, but——

Q. Well, did you——

Mr. Nesbett: Let him answer.

Mr. Faulkner: All right.

A. I wasn't particularly friendly with him.

Q. (By Mr. Faulkner): No. Didn't you feel that he was a little too strict when it came to public accounts?

A. No. I thought he took his, the impression to me was, he took his job too much to heart. [286]

Q. Too serious? A. Too serious.

Q. And you remember the incident he told about where he held up a check on a voucher of yours for five dollars? A. Yes.

Q. Something in connection with Dewey?

A. Yes.

Q. And those things you didn't like? Where he was very particular about accounts, you didn't like that?

A. When Frank Boyle was Auditor, he used to come down quite often to my office. I was on the first, and he was up on the third floor. Later on when he became Auditor, we held the same position; that is, we were drawing the same salary from the Territory; he called me up and asked me to come up to his office; he wanted to see me. Well, it struck me kind of funny. I said, "Did it occur to you it is just as far from your office to mine as it is from

(Testimony of Frank A. Metcalf.)

mine to yours? Why don't you come down here?" That is the last I heard about it.

Q. That was when, Frank?

A. That was——

Q. Approximately? A. Oh, late in 1952.

Q. In '52? A. Yes. [287]

Q. You say when he became Auditor?

A. Yes; after he became Auditor.

Q. Well, didn't he become Auditor in 1950?

A. Yes.

Q. Well, wasn't it then?

A. No. It was some time after.

Q. Oh, it was after then. Oh, I see. Excuse me. I misunderstood you. Mr. Moore was in the office quite a long time before Mr. Boyle died?

A. Yes. He was Mr. Boyle's assistant.

Mr. Faulkner: I think that is all. Thank you.

Cross-Examination

By Mr. Nesbett:

Q. Mr. Metcalf, what was this incident in connection with a five-dollar voucher and Governor Dewey? We might as well bring it out.

A. Well, Governor Dewey made a trip to the Territory, and, as chief of the Highway Patrol, I had two of my patrolmen with their cars out to meet them. The Governor was there in his car, and he asked that the patrolmen act as guides or go with him as they went around the glacier. Well, I said, "In that case I will take the baggage to the hotel." There was more baggage than what would fill my

(Testimony of Frank A. Metcalf.)

car, so I commandeered a taxi and asked him [288] if he would help me take this to the hotel.

Q. Was that Governor Dewey's baggage?

A. Governor Dewey's baggage and that of his party. And so when we got to the hotel he charged me five dollars for bringing it in, and I said, "Give me a receipt," which he did. I attached that receipt to a voucher and asked for reimbursement, and he wrote a lengthy statement on the account and said it was not the policy of the Democrats to pay the expenses of the Republicans.

Q. Was Governor Dewey Governor of New York at that time?

A. Yes; he was Governor of New York.

Q. And was he the guest of Alaska on that occasion?

A. He was the guest of our Governor at the time.

Q. Who paid that five dollars? A. I did.

Q. Were you ever reimbursed for the expenditure?

A. Governor Gruening offered to do it, and I said, "It is already taken care of, and let's forget it." I think, if I had written another voucher without explaining what it was, I could have got the five dollars as an expense account.

Q. Mr. Faulkner mentioned your picture in connection with this article entitled "Roden, Metcalf Say 'Nothing Crooked' Here." Your picture appears in the middle of that column. I will ask you whether or not your reaction [289] on seeing your picture in connection with the context of the entire front page made you feel like a potential jailbird or the wanted signs they stick around post offices?

(Testimony of Frank A. Metcalf.)

The Court: That is a rather leading question.

Mr. Faulkner: Yes; I think so, your Honor.

A. It should have had a number on it.

The Court: Will you withdraw that question and rephrase it? Ask him how he felt.

Q. (By Mr. Nesbett): Well, now, regarding this fund and these audits by Mr. Ehrendreich, I will ask you if you were ever contacted by any Territorial official with respect to these audits before you left office on April 1, 1953? A. No.

Q. Did these audits, as presented to you, or at least in your discussions with Mr. Ehrendreich, present any deficiencies that were sharply brought to your attention that needed correction?

A. No, they didn't.

Mr. Kay: May we have just a moment to examine this exhibit? We haven't seen it before.

The Court: Yes.

Q. (By Mr. Nesbett): Mr. Metcalf, at the conclusion of Mr. Ehrendreich's first audit, dated October 10, 1952, and [290] addressed to the "Territorial Board of Road Commissioners, Juneau, Alaska; Gentlemen," and then proceeding through numerous paragraphs, and in particular dealing with the matter of the purser's handling of the funds, there is this wording in Paragraph 3: "From our analysis it appears that the funds the purser can account for exceed the amount he is accountable for by $434.73. That such an overage exists is further evidenced by the fact that on the following voyages more cash was disbursed for expenses than

(Testimony of Frank A. Metcalf.)

was taken in from revenues and prepayments." That and the statement to that effect in connection with the last paragraph which reads as follows, just over the signature of Mr. Ehrendreich: "In my opinion, the Purser has satisfactorily accounted for all Territorial funds coming into his custody between June 25, 1951, and Sept. 30, 1952—Voyages #1 to#54, inclusive. Respectfully submitted, C. J. Ehrendreich." Certainly, that didn't cause you to have any doubts or qualms about the status of the fund, did it? A. No.

Q. You mentioned suspension of operation about October 10th. Would you explain to the Court and the jury just what you mean by that, in connection with the ferry?

A. The ferry was supposed to take cars back and forth from one terminus to the other, and early in in the fall the [291] pass over above Haines would be closed with snow, and no two years were the same, anywhere near the same, date, so it depended on the closure of the road when we stopped the operation of the ferry.

Q. What you meant by suspension of operation was when you laid it up for the winter; is that right? A. Laid it up; yes.

Q. Until you put it in operation the next spring or summer? A. Yes.

Q. You mentioned also, in response to one of Mr. Faulkner's questions, in order to satisfy the Coast Guard you had to put an entirely new bottom in that ship? A. Yes.

(Testimony of Frank A. Metcalf.)

Q. I will ask you whether or not you ran into other inconveniences and expenses in the operation of that ferry by reason of Coast Guard requirements?

The Court: Counsel, aren't we going still so far afield? If you limit this case to the issues, we have plenty to do.

Mr. Nesbett: I think so, too. I will be happy to do that. I know we got off the track rather innocently, but, well, if your Honor feels I shouldn't go any further——

The Court: I can't see any relevancy in such inquiry.

Q. (By Mr. Nesbett): Now, Mr. Metcalf, one or two other questions. When you left office on April 1, 1952, were [292] those canceled checks of the fund in your office? A. Yes.

Q. And you did not go back to the office in any official capacity after that date, did you?

A. No.

Q. Do you have any idea then what your successor might have done with them?

A. No, I don't.

Q. You have no jurisdiction over the checks, have you? A. No.

Mr. Nesbett: That is all, your Honor.

Mr. Faulkner: There is one question I forgot to ask Mr. Metcalf, your Honor, in cross-examination, in the first part of it this morning, with reference to the vote. Counsel asked him the vote of the election. If the Court holds that to be material—I

(Testimony of Frank A. Metcalf.)

didn't object to it. I wanted to ask him if he compared the primary vote with the vote in the election, and I wanted to ask him another question or two about that in order to——

The Court: It is not proper recross.

Mr. Faulkner: No; but it is a question I would like to ask him on cross-examination.

Mr. Nesbett: I have no objection.

The Court: Very well. [293]

Recross-Examination

By Mr. Faulkner:

Q. Mr. Metcalf, you spoke about the vote that Mr. Reed got in the primary election as compared with the vote that he got in the election in the fall, and you showed the difference in the number of votes. I will ask you this: In the primary election he was running against another candidate of his own party, wasn't he? A. No.

Q. Wasn't he? A. No.

Q. He had no opposition? And so two or three votes would have nominated him? A. Yes.

Q. Yes. So there was no reason for anybody to vote for him? A. No.

Q. In the fall election he was of course opposed to you? A. Yes.

Mr. Faulkner: I think that is all. Oh, there is one other question on redirect, too.

Q. (By Mr. Faulkner): You said that, about these checks, you said you left them in the office. Did you ever—before you left the office, some six

(Testimony of Frank A. Metcalf.)

months or more, seven months before you left the office, you had brought this suit, hadn't you? [294]

A. Yes.

Q. You had filed this libel suit. Well, did you ever take any steps to see that those checks would be available for this suit or copies of them or some evidence as to what was on these checks, before you left the office?

A. I didn't think they were relevant.

Q. You didn't think they were relevant. Now, here these checks were made out. You didn't make any attempt at all. You don't know today the names of the payees? A. No, I don't.

Q. Or the purposes for which drawn?

A. No, I don't.

Q. And you never, while you were there—you thought those checks belonged in the Highway Engineer's Office or the Treasurer's Office?

A. The Highway Engineer's Office.

Q. You thought they belonged in the Highway Engineer's Office? A. Yes.

Mr. Faulkner: That is all.

Redirect Examination

By Mr. Nesbett:

Q. Do you mean to say, Mr. Metcalf, that you can't remember the names of the payees and the amounts and the dates on all those checks [295] today? A. No. I didn't write the checks.

Mr. Faulkner: That wasn't the question. The

(Testimony of Frank A. Metcalf.)

question was any of them—did he remember the names of the payees on any of them.

Q. (By Mr. Nesbett): Now, Mr. Metcalf, as a matter of fact, Mr. Faulkner did make a demand upon us to produce those checks, didn't he?

A. Yes.

Q. And you had been out of office since April of '52 at that time, hadn't you? A. Yes.

Q. '53; pardon me. And, nevertheless, you did make an effort to locate those checks, didn't you?

A. Yes, I did; after I got this notice from Mr. Faulkner.

Q. Because he requested them? A. Yes.

Q. Now, with respect to the primary, while Mr. Reed had no opposition, but neither did you have any opposition? A. No.

Q. And the same existed in the general election?

A. The same existed in the general election.

Mr. Nesbett: That is all.

Recross-Examination

By Mr. Faulkner:

Q. Weren't you mistaken about that? Didn't Anita Garnick [296] run against him?

A. No, sir. No; she didn't run.

Q. She didn't run? A. No.

Mr. Faulkner: That is all.

The Court: That is all.

(Witness excused.)

(Whereupon, Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; whereupon, the trial proceeded as follows:)

HENRY RODEN

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Nesbett:

Q. Is your full name Henry Roden—R-o-d-e-n?

A. Yes, sir.

Q. How long have you resided in Alaska, Mr. Roden?

A. Oh, pretty nearly fifty-eight years.

Q. And what was your business or occupation when you first came to Alaska?

A. I came to Alaska in the winter of 1897 to '98 and engaged in the business of prospecting and mining, and later on, after having engaged in that line of work for about five [297] or six years and while continuing in it, I studied law, and I believe it was in 1906: possibly 1907, but I think it was 1906, when I was admitted to practice law at Fairbanks, Judge Wickersham being on the bench.

Q. Judge Wickersham? A. Yes.

Q. Was Fairbanks your first city of residence in Alaska, Mr. Roden?

A. No. I had resided on the Yukon River, a short time at Circle City, and in the fall of '98 I

(Testimony of Henry Roden.)

established my home at a town called Rampart in those days. Rampart was an important settlement then on the Yukon River. It has nearly disappeared now. And I didn't go to Fairbanks until about 1904 or '05 and there engaged in mining until I was, as I say, admitted to practice law.

Q. Mr. Roden, do you mind telling me your present age? A. My present age?

Q. Yes. A. I am eighty-one years old.

Q. Now, how long did you reside in Fairbanks, Mr. Roden?

A. I resided in Fairbanks—well, let me explain this. A few years after I was admitted to practice law I was appointed Assistant United States Attorney, and, while Fairbanks was my headquarters, I spent a good deal of my time on the Yukon River, and, when the discoveries were [298] made at Iditarod, the chief used to send me down there to attend the term of court which was held at Ruby and over at Iditarod at least once a year, but Fairbanks, of course, was my headquarters until 1912 when I was elected to the Senate of the first Territorial Legislature which met in March, 1913. The first of February, 1913. I resigned my position as Assistant United States Attorney and went to Juneau to attend the first session of the Legislature. After the session was over I returned to the Interior and practiced law until about 1920 when I came to Juneau, settled in Juneau, and engaged in the practice of law in Juneau.

(Testimony of Henry Roden.)

Q. Were you, Mr. Roden, elected to other offices while you resided in Juneau?

A. In 1935 I was elected from this division to the Senate and I served in 1935 and in 1937. I was again elected in 1938 and served in 1939 and 1941. In 1941 I had the honor of being President of the Senate. In 1940 I was elected Attorney General, and my term as Attorney General commenced on April 1, 1941. I served out that term, and then went back to private practice until, I think it was, in May, 1949, when the defalcations of the then Treasurer of the Territory became known, I was appointed to serve out his term. In 1950 I was elected to the office of Treasurer. At that time my Republican friends didn't [299] put up a candidate at all. And I served then until the first of April this year.

Q. As Treasurer?

A. Yes, sir; as Treasurer.

Q. The defalcations of the Treasurer preceding you, when you said that did you have reference to the defalcations or, rather, the fact or embezzlement of funds by Oscar Olson?

A. I mean the embezzlement of the Territorial funds by Oscar Olson.

Q. Now, Mr. Roden, as Treasurer of the Territory you were automatically a member of the Board known as the Territorial Board of Road Commissioners, were you not? A. That is right.

Q. And you were a member of that Board and also Treasurer of the Territory of Alaska?

A. Yes.

(Testimony of Henry Roden.)

Q. When that Board purchased the Ferry Chilkoot, were you not? A. Yes.

Q. Can you very briefly——

Mr. Nesbett: Now, your Honor, should I touch on this? I notice you seemed to want a word on it.

The Court: I do not believe that there is any dispute in the evidence about the matter of the purchase of the [300] Chilkoot. It would seem only repetitious and, therefore, may be avoided unless you believe it material.

Mr. Nesbett: Very well, your Honor, I will skip it.

Q. (By Mr. Nesbett): Now, Mr. Roden, after the Territory acquired the Ferry Chilkoot were any inconveniences, with respect to receipt and disbursement of money in connection with the operation of the ferry, experienced?

A. Yes. I made a couple of trips with the ferry myself, and I saw that the way it was being operated then would not do, and, particularly, when the ferry was taken to Seattle—that was in April, if I remember correctly, in 1952—to put a new bottom on it, I happened to be in Seattle, and Bob Coughlin was on the ship of course, and so was Steve Homer. Coughlin was hurt. I don't remember just exactly how it came about, but anyhow he landed in the hospital and was there for probably ten days or two weeks, and I had to step in quite a little and assist Homer to carry on the repairs and to get the boat ready to get her back up here for the 1952 season.

I think she came back about, oh, it must have been

(Testimony of Henry Roden.)

in May, and it was then early in June when we had this meeting of June 5th, which has been referred to here, when it was determined that the receipts from the ferry should be deposited in a fund and that Coughlin as our agent should be the only one who could draw on those funds. [301]

Q. That was, as a matter of fact, your proposal at that meeting, wasn't it?

A. It was my proposal.

Q. And was that proposal and plan carried out?

A. It was.

Q. I will ask you, generally, whether or not that plan succeeded?

A. I think that plan succeeded very well.

Q. Now, I will ask you whether or not the Attorney General was present at that meeting at which this plan was proposed? A. He was.

Q. Did he offer any objection or make any statement in connection with the legality of the method proposed? A. I think not.

Q. And do you know how long that method then of handling receipts and disbursements was used by Coughlin and the Board?

A. Practically for the rest of the season, that '52 season.

Q. Do you know whether or not Mr. Coughlin operated that ferry in the seasons subsequent to 1952?

A. Mr. Coughlin operated the ferry all of the year 1953, all of the year 1954 and in the year 1955 up until about the first day of May, when he was

(Testimony of Henry Roden.)

again requested, and had an agreement with the Territory, to operate it for [302] this year also, but declined to do so.

Q. Do you know whether or not Mr. Coughlin, would you know as Treasurer, whether Mr. Coughlin was ever approached with respect to any shortages in the fund with respect to the years 1952 and '53?

A. I am quite sure he was not.

Q. Mr. Roden, do you recognize Plaintiffs' Exhibit No. 1, the front page of the Alaska Juneau Empire? A. I do.

Q. Or, rather, Daily Alaska Empire. Will you please state to the Court and the jury your reaction upon reading the items outlined on that page in connection with the Chilkoot fund and the headline in black type which reads "Bare 'Special' Ferry Fund"?

A. Well, sir, it is pretty difficult to explain how I felt. First I was angry and then I was sad and sorry, because I felt that, after fifty-five years in the Territory and knowing the Empire as I had known it and its operators, I did not deserve that sort of treatment.

Q. I will ask you to look at that headline again. "Bare 'Special' Ferry Fund," is that in your opinion a true and accurate job of setting up a headline in connection with the following context?

A. I would say not.

Q. In what respect is it not? [303]

A. Well, the very word "Bare" would indicate that, so to speak, something has been discovered;

(Testimony of Henry Roden.)

something has been uncovered; something that was hidden; something that the general public couldn't see.

Q. Was that the fact in connection with this fund? A. No.

Q. Was there anything special about the fund?

A. There was not.

Q. Now, it says as a subheadline "Reeve Raps Graft, Corruption." which subheadline appears immediately above the photostatic copy of a check made payable to Steve Larsson Homer, dated 20 August, in the amount of $398.04. What was your reaction when you read that and saw the position with respect to the check?

A. Well, there was no truth in the statement. It wasn't true.

Q. Did you read the article which goes with the headline "Reeve Raps Graft, Corruption" with a picture of Bob Reeve; you did, didn't you?

A. Oh, I read it; yes.

Q. Does that article mention the Chilkoot fund in any respect? A. No.

Q. Or this check? A. No. [304]

Q. Is it then in your opinion, just considering the position of the headline and the check, is it the type reporting that would convey the right impression to a reader with respect to the fund or Reeve's activities and the check?

A. Well, I think the position of the check was intended to influence the reader and to indicate that there was something wrong somewhere.

(Testimony of Henry Roden.)

Q. The subheadline to the feature article reads in rather large type "Gruening, Metcalf, Roden Divert 'Chilkoot' Cash to Private Bank Account." Is that a true and accurate job of reporting?

A. We did not divert any money to any private bank account.

Q. Is there any such thing, I will ask you, as a public bank account?

A. Well, that may be a hard question to answer. As far as the Territory was concerned, we had an account in every bank in the Territory.

Q. Well, are those banks all private banks? Were they not?

A. Some of them are private banks; some of them are—yes, they were private banks, every one of them.

Q. Even though they might be national banks?

A. They might be national banks but they are still owned by private parties.

Q. They are owned by private citizens? Are they not? A. Yes. [305]

Q. In the feature article, Paragraph 2, there is this wording, Mr. Roden, "Into it," referring to the fund, "have gone the receipts from the operation of the ferry which was purchased by the Territory in May, 1951, and there have been thousands of dollars of illegal receipts and disbursements recorded in the fund to date, Moore charged." Is that a true and accurate statement of the fact?

A. No; that is incorrect.

(Testimony of Henry Roden.)

Q. And will you explain briefly why you think it is incorrect?

A. The money was put in this fund for a public purpose. It was put into the fund as a legal proposition, a proposition supported by the Attorney General, and I myself had given the matter considerable study from the legal standpoint, and we had a perfect right to create this fund and put a certain sum of money into it coming from a certain source.

Q. Then is that statement in effect false?

A. It is false; yes.

Q. Under the subheading of that paragraph in rather bold type, rather, the subheading "Illegal Payments," there is this wording: "The 'special fund,' which dates back to early last year, is in the B. M. Behrends Bank" and so forth. Is that a false statement?

A. Well, it is incorrect as to the date. [306]

Q. In what respect?

A. This happened a year later than the article says there.

Q. "Early last year" would refer naturally to—— A. 1951; early in 1951.

Q. The Territory did not even own the ferry then? A. No.

Q. Then it is in your opinion an inaccurate report? A. Certainly.

Q. Mr. Roden, in that same article there the fund is referred to in Paragraph 3: "After learning of the unauthorized account late last month, Auditor

(Testimony of Henry Roden.)

Moore and Assistant Attorney General, John Dimond" and so forth. Is that an unauthorized account in your opinion? A. No, sir.

Q. And is the phrase "the unauthorized account" true or false in your opinion?

A. Incorrect.

Q. And then the next paragraph following: "The case," it reads as follows, "The case closely parallels that of Oscar Olson, former territorial treasurer who is now serving a prison term at McNeil's Island penitentiary for violating the law in the receipt and disbursement of public funds." What was your reaction when you read that paragraph, Mr. Roden?

A. Well, as it indicates that, if our action followed very [307] closely, we were practically accused of doing the same thing which Oscar Olson did, namely, stealing the money from the Territory, actual stealing of the money that belonged to the Territory.

Q. Did the words "closely parallels" cause you to form that opinion?

A. Well, for all practical purposes the reader would say, "Well, they stole the money," if it closely parallels with Oscar Olson, practically the same, closely the same, almost the same.

Q. As a matter of fact, you succeeded Mr. Oscar Olson as Treasurer; you were appointed to do so, were you not? A. Yes, sir.

Q. Do you know the method by which Oscar Olson accomplished his defalcations?

(Testimony of Henry Roden.)

A. In a general way I do; yes.

Q. Did the method used by Oscar Olson closely parallel in any fashion the acts that you, as a member of the Board of Road Commissioners, had done?

A. Not at all.

Q. In any respect? A. In no respect.

Q. You had occasion to go over the defalcations in the office immediately after he left, did you not?

A. Yes. As I say, in a general way. I didn't go into any [308] details. I know what he did.

Q. The phrase in that same column, which is the inside column of the feature article, refers to the action of the Board as "side-tracking the money." Do you consider that, or rather, is that a true and accurate report of the action of the Board?

A. It is not true.

Q. In what respect, sir?

A. We did not side-track any money.

Q. Now, Mr. Roden, in a subsequent paragraph in the same inside column of the feature article the meeting of the Board at which this ferry fund was set up is given as June 6, 1951; is that accurate?

A. No.

Q. What was the date?

A. It was in June, 1952.

Q. Then the statement is inaccurate by one year; is it not? A. Yes.

Q. In a subsequent paragraph it refers to the actions of the Board as allowing the money to be handled without the knowledge or approval of the Auditor. Is that accurate reporting?

(Testimony of Henry Roden.)

A. The Auditor must have known of it.

Q. Why?

A. Because up to a certain time he had paid all the bills [309] through the road fund, as we call it, or the gas tax fund, and all at once it ceased, this method ceased. As the "watchdog" of the Treasury, as the Empire calls him, he must have observed that.

Q. Mr. Roden, in the last paragraph it says the fund was opened in the name of "Robert E. Coughlin." Is that statement correct? A. No.

Q. Why not?

A. It was opened in the name of "Chilkoot Ferry by Robert E. Coughlin."

Q. Now, have you read this article, or rather, this editorial, which was also placed on the front page, entitled "Start Talking, Boys"?

A. Yes; I have read it.

Q. What was your reaction on reading that editorial, sir?

A. Well, that expression, "Start Talking, Boys," reminded me, when I saw the United States Marshal taking out the prisoners here yesterday, saying, "Come on, boys." That is the way to address, apparently, the criminals or at least people who are accused of having committed a crime, and that is the impression I got then.

Q. Did the fact that, in what should have been a dignified editorial, the Empire referred to three of the highest officials of the Territory as "Boys"

(Testimony of Henry Roden.)

strike you as a [310] fair report or comment on the given situation? A. I would not think so.

Q. In that editorial the statement is used that "the money," referring to the fund, "which should have gone into the general fund." Is that accurate, Mr. Roden? A. No.

Q. Why?

A. The Attorney General was of the opinion that it was not necessary that it go into the general fund, and that was my opinion also.

Q. Your opinion was based upon a section of the Code dealing with the matter of monies received from licenses, taxes, fees, and other monies; was it not?

A. Other monies; yes; as it was fully explained in the communication by the Attorney General.

Q. In a rather lengthy opinion?

A. In a rather lengthy opinion given long before this transaction took place. I think that was given in December, 1951.

Q. That editorial also refers to the checks on the fund as being, the only name on the checks as being that of Robert E. Coughlin. Is that strictly correct and accurate? A. No.

Q. In what respect? [311]

A. The checks are all signed "Chilkoot Ferry by Robert E. Coughlin."

Q. Do you ever recall that the Empire printed an editorial on the front page of the paper?

A. I won't be positive about that. They may

(Testimony of Henry Roden.)

have done it. I don't know. I don't recall the occasion.

Q. In the next to the last paragraph of the editorial it reads as follows: "But this is a case where Gruening, Roden and Metcalf will have to stand on their own feet and explain to Alaskans whether the territorial law is applicable to some and not to others or whether they acted in complete defiance to the law in the belief they would not be caught." Is that, Mr. Roden, a fair comment and accurate in respect to the situation they purported to deal with or comment on?

A. No. I think that expression, "not be caught," is false. There is nothing to it. There was nothing to be caught for.

Q. Do you have any comment to make on the phrase that the three members, Gruening, Roden and Metcalf, are going to have to stand on their feet and explain to Alaskans?

A. Well, as far as that is concerned, we have nothing to explain. Everything was self-evident and could be easily investigated.

Q. Now, with respect to the last paragraph: "Oscar Olson [312] sits today in his prison cell, dreaming of the days when he thought territorial laws were only for the underlings." Is that, sir, strictly accurate or anywhere near accurate as a comment on the facts?

A. Oscar Olson sat in the prison cell because he stole the Territory's money. It doesn't matter what he thought. That is what he was in prison for.

(Testimony of Henry Roden.)

Q. Does it have any connection whatsoever with the acts they were purporting to report or inform the public of?

A. No similarity between the transactions at all.

Q. Mr. Roden, as a member of the Territorial Board of Road Commissioners, were you ever informed that there was any shortage in the monies handled by Robert E. Coughlin?

A. Well, there was a report came out at one time, and I talked that over somewhat with the Attorney General in the most casual manner. I was never asked about it at all or advised of anything definite.

Q. Were you, as a member of the Board, asked to take any action in connection with any shortage?

A. No, sir.

Q. Did you know that any shortage purportedly or might have existed?

A. I was positive there was no shortage.

Q. Now, Mr. Coughlin continued to operate the ferry for a number of years after this publication, did he not? [313]

A. If there had been any shortage—Coughlin continued to operate the ferry after Frank Metcalf went out of office and the new Highway Engineer came into office, which happened on April 1, 1933, and Coughlin operated the ferry for the entire balance of the year, that is, from April, 1933, to——

Q. 1953?

The Court: You said 1933. You meant 1953?

A. Yes, your Honor; 1953. When the Territory

(Testimony of Henry Roden.)

paid him thousands of dollars for his time. Coughlin operated the ferry through the entire year of 1954, and the Territory paid him thousands of dollars for his time, and Coughlin operated and was in control of the ferry until just about the first day of May this year when he again was requested by the Territory to operate the ferry for this year, and he said, "No. I don't want to operate it any more." If he had owed anything, surely, the watchdog of the Territory wouldn't have paid him thousands upon thousands of dollars.

Q. Mr. Roden, did you suffer any humiliation after you read this edition of the Empire of September 25th? A. Well, in a way I did; yes.

Q. Well, will you explain it just briefly so that the Court and the jury will understand?

A. Well, I am getting to be an old man, and, as I said [314] before, after being in the Territory at that time 55-56 years, and I did know that I had built up a pretty good reputation, it was humiliating at least to an extent, and that is the way I felt about it.

Q. I will ask you whether or not it worried you that the publication was made and circulated all around the Territory and outside the Territory?

A. Well, to be frank about it, it didn't worry me very much; no. I knew my friends wouldn't believe it, and of course those people, who didn't know me, they might form an opinion of course, naturally would, I suppose.

Q. Can you state whether or not in your opinion

(Testimony of Henry Roden.)

your reputation in Alaska then has been damaged by this publication? A. I presume it has.

Q. Why do you say that, sir?

A. Well, you couldn't come to any other conclusion. If you say a man is a thief, it certainly doesn't enhance his reputation.

Q. You had no newspaper to print a denial, did you, and give it the same circulation? A. No.

Mr. Nesbett: No further questions.

Cross-Examination

By Mr. Faulkner:

Q. Mr. Roden, you know now there was a shortage, don't you? [315]

A. No; there isn't a shortage, Mr. Faulkner; there can't be.

Q. What is that?

A. There can't be no shortage.

Q. How is that?

A. The Territory surely wouldn't pay Bob Coughlin thousands of dollars for running the ferry if he owed the Territory anything.

Q. That wasn't the question. If funds were received and no account made of their being received and they were spent by somebody else or lost on the street, there could be a shortage, couldn't there?

A. According to the last audit made on March 15, 1953, by the Arthur Anderson Company, I presume they had all the checks and all the records

(Testimony of Henry Roden.)

present. At that time they said it was three hundred and some cents short.

Q. Three hundred dollars?

A. I think it was three hundred dollars and some cents long. That is the way that report reads, long not short.

Q. We have the report. But, after this account was closed in the bank, how were the funds handled then?

A. I don't know; the account never was closed.

Q. Are you sure of that?

A. I told them not to close it.

Q. That Chilkoot Ferry account by Robert E. Coughlin was not closed? [316]

A. I told them not to close it. That is what I said.

Q. Did you ever look at the bank ledger sheets?

A. No.

Q. Did you check into that before you came down here? A. No.

Q. So you are not sure then whether it was closed or wasn't closed?

A. I am not positive whether the bank carried out my instructions to them.

Q. Now, how was this fund handled after Neil Moore went to the bank and told them to stop the payments out of the account?

A. The end of the season had come, and the Highway Engineer made another application to the Attorney General for his opinion, and the Attorney General repeated again that the special account was

(Testimony of Henry Roden.)

perfectly legal and could be paid out by the parties who put the money into it. That was the opinion again of the Attorney General the second time.

Q. Now, let me ask you this. Isn't the Attorney General, you are talking of, Mr. Williams?

A. Yes.

Q. Didn't the Attorney General in October or September—I don't know the exact date but right after this publication—write an opinion in which he said that the funds [317] should be sent to the Treasurer and then sent to the Motor Fuel Tax Fund and paid out of there?

A. No, he didn't.

Q. He did not do that? A. No.

Q. He didn't do that?

A. I know that opinion.

Q. Well, it was published, wasn't it?

A. I beg your pardon?

Q. It was published in the papers?

A. I don't know whether it was published or not.

Q. Well, then, that is the way it was handled after that, wasn't it?

A. I don't know. I presume so; yes.

Q. So that, if Coughlin continued on, he was continuing on under a different arrangement when he continued on to operate the ferry?

A. Well, all right, let's say he did; yes.

Q. Now, when you set up this special account, did you put him under bond? Did he ever give a bond to the Territory?

A. It wasn't necessary to put him under bond.

(Testimony of Henry Roden.)

Q. It wasn't necessary? A. No.

Q. Now, you said that this fund, that there is nothing secret about it. Was any publicity—did the general [318] public know anything about that fund, or did they have any way of knowing about it?

A. Well, there were plenty of checks drawn against it. I guess every business man in Southeastern Alaska knew about it, between Yakutat and Ketchikan.

Q. Well, did they know what it was and how it came about, is what I mean? Did they have any means of knowing that? A. Yes.

Q. How?

A. All they had to do was go and ask about it and find out.

Q. I know; but, without asking about it, was the public generally informed of what happened, until the Empire came out with it in the paper?

A. The public wouldn't be informed about any fund that belonged to the Territory.

Q. And there is nothing much in the Highway Engineer's Report giving any information, is there?

A. I don't know what is in the Highway Engineer's Report.

Q. Well, there is no mention of it at all.

A. Well, apparently; you read from it this afternoon.

Q. Well, I mean the way the funds were handled. There is no mention in the Highway Engi-

(Testimony of Henry Roden.)

neer's Report as to the way this ferry fund was handled, so that the public didn't know it?

A. The general public doesn't know yet how any Territorial [319] funds are handled.

Q. Well, don't you think they should?

A. If they want to find out, it is easy to find out; they can ask about it.

Q. Well, the law sets up a method, Henry, doesn't it?

A. Yes; the law sets up a method.

Q. And the law prescribes it should go into the Treasury, where there are Territorial funds?

A. Oh, no; not according to the opinion of the Attorney General, they shouldn't go in.

Q. Well, I know; but you are a lawyer yourself; and the Court is not bound by an opinion of the Attorney General. Doesn't the law prescribe the method by which public funds shall be handled?

A. Certain public funds, yes; but not all public funds.

Q. Well, but it says any public money or any money in which the Territory, or any funds in which the Territory or any county, municipality or subdivision has an interest? A. No.

Q. Wouldn't that be public funds?

A. No. They need not go into the general fund, Mr. Faulkner. You are a lawyer also, and you know it.

Q. No; I didn't say the general fund. I mean to the Treasury. A. No. [320]

Q. It doesn't say that?

(Testimony of Henry Roden.)

Q. It wasn't necessary? A. No.

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Q. No; I didn't say the general fund. I mean to the Treasury. A. No. [320]

Q. It doesn't say that?

(Testimony of Henry Roden.)

A. No. It happens every day.

Q. That it must be paid over to the Treasury?

A. Transactions that don't go through the Treasurer's Office happen every day pretty near.

Q. What is that?

A. Transactions where money is taken in by a public officer don't go through the Treasurer's Department at all.

Q. What is that?

A. What is that? Well, I will give you an example. For example, a delinquent father who has a child in a foster home, the Department of Welfare goes after him and says, "Here, you have got to pay that foster home, say, fifty dollars a month." Well, he hums and haws around for a while and he says, "I will pay you that fifty dollars but I won't pay it to the foster home." And the Welfare Department, they accept fifty dollars, and the Treasurer never knows it, and turns it over to the foster home. I will give you another illustration if you want me to. A man dies, and there is no money in his estate, and under the Social Security Law the Federal Government pays for the funeral. The Federal Government pays for the funeral to the parties who pay for it. The undertaker has no money to bury the man, and he says, "I must have money to buy the coffin." All right; so the Welfare Department [321] goes and says, "All right. We will pay you; we will pay the man that paid for the funeral," and then, when the money comes from the Federal Government, it doesn't go through the

(Testimony of Henry Roden.)

Treasurer's Office; it goes directly to the people to whom the Welfare Department advanced the money.

Q. Well, that is not hardly in the nature of public funds that——

A. It is in the same way it was with the ferry fund; it was not public money in the sense that it had to go through the Treasurer's Office.

Q. Of course this is more or less argument. What authority did the Board of Road Commissioners have in the first place to purchase the Chilkoot Ferry and to operate it?

Mr. Nesbett: Now, your Honor, I didn't go into that.

The Court: I had understood that there was no question about the authority of the Board to purchase this ferry.

Mr. Faulkner: Oh, yes, there is. There is no law in the Territory that authorizes that.

The Court: It was admitted in the pleadings, wasn't it, counsel?

Mr. Faulkner: They purchased it, yes; but under what authority? How did they do it? How did they set up this fund?

The Court: May I see the complaint here?

Mr. Faulkner: I think the fact that they purchased it [322] is admitted, your Honor, but I don't think the authority——

The Court: I think the fact that it was legally purchased is admitted.

Mr. Faulkner: I don't think so, your Honor. I might be mistaken.

(Testimony of Henry Roden.)

The Court: Just a moment. Paragraph IV of the amended complaint of the plaintiffs—the same is true in each case—recites—that before the commission of acts by defendant hereinafter complained of the said Frank Metcalf, Gruening, and so on, comprising the Board of Territorial Road Commissioners, purchased and acquired for and on behalf of the Territory the Motor Vessel Chilkoot and caused the same to be operated upon the waters of Southeastern Alaska.

Mr. Faulkner: I think we admit that.

The Court: O.K.; fine—for the transportation of passengers and carrying freight—purchased and acquired for and on behalf of the Territory—and caused to be operated—in order to operate the vessel it became necessary to employ seafaring men, and so on. The costs and expenses thus incurred were paid in part by the Board out of revenues earned from the vessel.

That is admitted in your answer.

Mr. Faulkner: That is right, but it is not admitted that they had any legal authority to purchase it, because they didn't. [323]

The Court: Well, this is the first time that the Court has been aware that there is any such issue as to the legal authority to purchase it, and we will hold it is not relevant here. This case involves not the purchase of any vessel but it involves the operation of the vessel, and it certainly is not relevant, and I will sustain objection to that question. We

(Testimony of Henry Roden.)

will get so far afield that no one will know what this case is all about.

Mr. Faulkner: Well, but, your Honor, the thing I am driving at is what are public funds and what are not. Does the Territory have any interest in these funds, or are they just to be handled by some unauthorized person without bond.

The Court: Well, I hold any evidence relating to the purchase of this vessel is not relevant here.

Mr. Faulkner: Well, if the Court rules that——

The Court: Yes, sir.

Mr. Faulkner: I will take an exception to the Court's ruling. Pardon me just a minute, your Honor. I think that is all.

(Whereupon, the trial was adjourned until 10:00 o'clock a.m., November 17, 1955, and resumed as per adjournment, with all parties present as heretofore and the jury all present in the box; whereupon the trial proceeded as follows:)

The Court: Before proceeding—Mr. Faulkner, on the matter of the question asked the witness just before [324] adjournment yesterday, to which objection of the plaintiffs was sustained, I did not mean to cut you short on that. It occurred to me, if you desire to be heard on that point and you deem it material, the Court will be glad to hear from you further on it. It occurred to me afterwards that I possibly did not give you an oppor-

tunity to be heard upon it, and, if you care to, we will excuse the jury and take up that matter.

Mr. Faulkner: That was the matter of the legality of the purchase of the ferry?

The Court: Yes. Of course, in this particular instance, there is another objection, which I failed, I think, to state, which I had in mind, that it would not be proper cross-examination because we precluded the plaintiffs from examining the witness on the same subject. However, if you were permitted to go into it, then we would have to permit the plaintiffs to reopen his examination of the witness, but, if you wish to be heard upon it, why, I will be pleased to hear from you further.

Mr. Faulkner: Well, I would like, your Honor, to state my position on it.

The Court: Well, possibly we should excuse the jury then, because it is not the purpose of the Court to exclude either party from anything which is actually relevant here.

Ladies and gentlemen, would you just retire [325] for just a few moments then while we discuss another matter of law?

(Whereupon the jury retired from the courtroom.)

Mr. Faulkner: If the Court please—well, excuse me just a minute. I think I have something here.

This matter came before the Court once before, your Honor, this Court, but the matter was decided on another point, and the Court didn't rule on this particular point. This came up in a libel case, not this kind of libel case, but a libel of a vessel, libel

of the Chilkoot, and the vessel was libeled, and the Attorney General claimed that the vessel was operated by the Territory, owned and operated by the Territory, and therefore not subject to libel.

Well, I had two grounds in opposition to that claim. One was that the vessel was at the time of the seizure chartered; and the other one was that the Territory had no authority to engage in the ferry business, and that is what I would present to the Court very briefly.

Now, the Court under Judge Folta held that, since the ferry was chartered, it was not at that time an instrumentality of the Territory and was subject to libel, and, therefore, our libel action was covered, and that case was later on settled between the Territory and the libelant, so that it never came to actual trial, except the legal points were passed upon there.

Now, the point I wish to make is that our statute on [326] ferries is found in Sections 41-4-1 and 41-4-13 of the Alaska Compiled Laws. Those sections provide that the commissioners, the United States Commissioners, may issue licenses to persons to operate ferries on lakes and rivers. The statute expressly provides that nothing in the statute shall be held to authorize a license—I think that is the way it reads; I am not quite sure; your Honor has the statute there—a license to be issued for the operation of a ferry on an arm of the sea or a bay. So based upon that—then the statute goes on to provide for license fees and regulations for ferries by the United States Commissioners who issue the

licenses, who are permitted to make rates and to change them from time to time, and then the statute concludes with that language, that nothing herein shall be considered to authorize the operation of a ferry on a bay or an arm of the sea. I think that is the exact language.

Now, the Territory at that time argued that this ferry was purchased and operated under the authority of the Board of Road Commissioners because of the statute which gives them the right to build highways and to cooperate with Federal agencies in the building and maintenance of highways, and that statute says also in the building and repair of not only roads but ferries, and there are ferries, as your Honor may know, across rivers where highways extend on both sides of the river. [327]

Now, I argued there and I submit again that this was not or could not be authorized as a link in a highway system, because a ferry operated between Haines and Juneau came from a highway system to a place which was not on the highway system and not connected in any way with it.

The Court: Well, counsel, I dislike to interrupt you, but here is the point we have in mind. Where is there any issue in this case in which the Court may be called upon to hear or determine any question of the legality of the purchase or original operation of this ferry? It is a purely collateral matter; and here is our position. There is only one issue here, and that is the matter arising about this Chilkoot Ferry fund which was set up in June of 1952 sometime after the ferry was purchased

and put into operation, and the question of whether or not the publication is libelous and, especially in this respect, as to whether the publication is true. Now, I find no reference whatever in the publication, which is in issue here, in the Empire as to—relating to the original purchase or the illegality of the operation of the ferry. It is only the illegality of the fund.

Mr. Faulkner: That is right, your Honor; I am not so confident that I am correct about this. I will be frank to tell the Court that it does seem like a collateral issue. The purpose I had in asking this question was to bring out that this ferry was operated without authority of law—it was [328] purchased without authority of law and operated without authority of law, and that the whole arrangement, as the minutes of the meeting say, was to operate this as a private enterprise; the minutes which were introduced here yesterday show that they determined to operate it as a private enterprise. Now, having done that, then they base their authority for setting up this ferry fund on expediency and, as they claim, necessity. Now, that does enter into the case, and it may be purely collateral. I don't like to take up the Court's time with it, and I don't think it is too important, but I tried to get it in for that reason, to show that they purchased it with no authority at all, and, even if they acted under the very best motives, which I am sure they did, in buying it, they then found that, having no authority of law, they had to set this up as a private enterprise and operate it as a private enter-

prise but with public funds, and then they set up this arrangement for having the funds all in the name of someone who was not a Territorial official. Now, that is the point I had, your Honor, but, as I say, I don't like to take too much time, and it isn't too important, but I just felt that that evidence was admissible and then I could argue on it to the jury.

The Court: Well, Mr. Faulkner, to me it isn't too much a matter of time, but the matter of confusing the jury on a collateral issue. If we go into a matter which is purely and wholly collateral, we merely confuse the issues before the [329] jury rather than clarify them, and we would be required to try a matter here which is not before the Court at all.

Mr. Faulkner: I think the issues can be stated and raised here without that, your Honor, and I am very glad to have the Court's ruling on it, because I had thought that it was permissible and I would have had to ask you later on whether it could be used in argument, so, if the Court holds that way, it is quite satisfactory.

The Court: Had there been any mention in the published article, any criticism in the published article, in regard to the original purchase or the illegality of the purchase, then I think it would be in issue here, but I am unable to find any. The article purely related to this operating fund, the Chilkoot Ferry fund. So, I must adhere then to the former ruling——

Mr. Faulkner: Very well. We will not continue to go into that any further.

The Court: ——as the evidence is irrelevant. You may call in the jury.

(Whereupon the jury returned and all took their places in the jury box.)

The Court: We will proceed then with the trial of this action. Were you finished with the cross-examination of Mr. Roden?

Mr. Faulkner: Yes. I think Mr. Nesbett wanted to [330] call him again.

The Court: He may be called.

Mr. Nesbett: I had thought I would, prior to Court convening, but I have changed my mind, your Honor. We rest our case in chief.

The Court: The plaintiff rests.

Mr. Faulkner: If the Court please, we can go on with the defense?

The Court: Yes.

Defendant's Case

Mr. Faulkner: I would like to call Mr. Daum. I think he is downstairs.

The Court: Would you call him then? (Addressing the bailiff.)

Mr. Faulkner: Perhaps, while we are waiting for Mr. Daum, I have some exhibits that I would like to offer, and the first one is a report of Arthur Anderson Company, a portion of a report of Arthur Anderson Company, upon the receipts and disburse-

ments of the ferry for the biennium 1951 and '52. This is a certified copy, certified by the Auditor of the Territory, who has the official records of funds received and——

Mr. Kay: We have no objection.

The Court: The exhibit may be admitted. [331]

Mr. Kay: Your Honor, may I state—I perhaps shouldn't have been so fast—we do object to it on the ground of relevancy; it seems to be totally irrelevant.

The Court: Well, we determined that subject yesterday, and upon the assurance of counsel and the statement that it does cover the period, all of 1951 and 1952—isn't that correct, Mr. Faulkner?

Mr. Faulkner: That is right.

The Court: It may be relevant and may be admitted then.

The Clerk: This will be C.

Mr. Faulkner: C was the Ehrendreich report.

The Clerk: This will be D.

Mr. Faulkner: No. D is the Highway Engineer's Report, printed report.

The Court: Exhibit E then.

The Clerk: I haven't had a chance to straighten these out this morning. Yes; here they are. This is E.

Mr. Faulkner: Next I should like to introduce the certificate of the Treasurer of the Territory, Hugh J. Wade, dated October 26th, under the seal of his office, stating that there are no cancelled checks of the Chilkoot Ferry on file at his office. I want to introduce these, your Honor, to show what effort was made to find these checks. They might

have been in the Auditor's Office or the Treasurer's Office or the [332] Highway Engineer's Office, and I want to show that they are not in any one of those offices.

The Court: The certificate may be admitted in evidence.

The Clerk: Exhibit F.

Mr. Faulkner: The next is a certificate of Irving J. Reed, or Irving Reed, the Highway Engineer, showing that no checks have been found in his office after a search, and this is certified and signed by Mr. Reed and certified—attested to by the Secretary of Alaska.

The Clerk: Exhibit G.

The Court: Any objection?

Mr. Kay: I think both of these are completely irrelevant, but, since they have been passed upon in effect, we have no objection.

The Court: The exhibit may be admitted then.

Mr. Faulkner: We next offer the certificate of John A. McKinney, Director of Finance, who succeeded to the Office of the Auditor, dated October 26, 1955, showing that after diligent search no cancelled checks on the Chilkoot Ferry fund can be found in his office.

Mr. Kay: Same objection.

The Court: The same ruling. It may be admitted.

The Clerk: Defendant's Exhibit H.

Mr. Faulkner: I next offer the certificate of the [333] Highway Engineer, Irving Reed, signed by the Administrative Assistant, Thelma Zenger, that there is no bond of Robert E. Coughlin in connection with the operation of the Chilkoot Ferry on

file in the Office of the Highway Engineer, and this certificate is——

Did I give you a copy of that?

Mr. Kay: No.

Mr. Faulkner: I will. This certificate is attested by the Secretary of Alaska.

Mr. Kay: It is totally irrelevant, and I don't think there was any testimony put in, or that any attempt was made to, that Coughlin was under bond.

The Court: Well, it has been admitted, I think, by Mr. Metcalf.

Mr. Faulkner: No; my recollection is that he said he didn't know.

The Court: That may be true.

Mr. Faulkner: Yes, I think so, your Honor. I might be mistaken about that.

The Court: The relevancy is doubtful, but it may be admitted if you believe it has been.

The Clerk: Defendant's I.

Mr. Faulkner: I next want to introduce on behalf of the defendant——

Mr. Nesbett: Pardon me. I didn't get a copy of "I." [334] What was that please?

Mr. Faulkner: That is the one I just brought you; that there was no bond in the Highway Engineer's Office.

I will next offer a certificed copy of the Judgment and Commitment of Oscar G. Olson, certified by the Clerk of this Court.

The Court: I assume there would be no objection?

Mr. Kay: No objection.

The Court: It may be admitted.

The Clerk: Exhibit J.

Mr. Faulkner: Now, if the Court please, I would like to call Mr. Daum.

JACK D. DAUM

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Faulkner:

Q. Mr. Daum, will you please state your name?

A. Jack D. Daum.

Q. Where do you live, Mr. Daum?

A. I live in Anchorage.

Q. And how long have you lived in Anchorage?

A. Since January of last year.

Q. What is your occupation?

A. I am a newspaperman. [335]

The Court: Pardon me. Is that D-a-u-m?

A. Yes, sir.

Q. (By Mr. Faulkner): How long have you been engaged in that work? A. Since 1949.

Q. Where? A. Well, actually——

Q. Where and in what capacity?

A. Well, I have been in newspaper work actually since high school. I was editor of my high school paper, and in the Army I was correspondent for Yank newspaper, and, when I got out of the Army in '45, I worked in Midland, California for the U. S. Gypsum Company in the capacity of cost accountant

(Testimony of Jack D. Daum.)

and I put out a company newspaper there for the employees. That was in '45 and '6. Then in '46 and '7 in the winter I was attending the University of Washington and worked on the student paper there, and in '47 and '48 I was attending the University of Alaska and was editor of the student paper, the Polar Star. Well, in '47 also, prior to entering college, I worked for the Birch, Johnson & Lytle Construction Company as assistant camp manager and published an employee newspaper at Eielson Air Force Base, and in '49 after leaving the University of Alaska I went to work for the Daily News Miner as a reporter. [336]

Q. Where?

A. In Fairbanks; and worked there '49, '50, until January of '51, at which time I was city editor of the News Miner, and in '51 I went out to the Washington, D. C., Times Herald, where I worked as editorial writer for six months and general assignment reporter for a year, until September of '52, at which time I came back to Alaska as reporter for the Daily Alaska Empire, and I left there in June of '53 to return to Fairbanks, and subsequently went to work for the Alaska Railroad as publicity agent.

Q. And is that what you are doing now?

A. I am presently employed at the Alaska Railroad.

Q. About when did you come to work for the Alaska Daily Empire in 1952?

A. About September 9th or 10th of '52.

(Testimony of Jack D. Daum.)

Q. Of 1952. Now, there has been introduced here a newspaper, a copy of the Daily Alaska Empire for September 25, 1952, Plaintiff's Exhibit No. 1, which I will hand you and ask if you are familiar with that paper and with the articles and reports on the first page? A. Yes, sir; I am.

Q. Who wrote the articles with reference to the ferry fund? A. I wrote that story.

Q. And who wrote the editorial on the front page there? A. I wrote that story. [337]

Q. And who wrote the story about Mr. Reeve's speech?

A. Mr. DeArmond wrote that story.

Q. Robert DeArmond?

A. Robert DeArmond; yes, sir.

Q. Was he a reporter at the same time?

A. Yes. He was a stringer for the Empire. He wrote articles for us from time to time. He was what we call a stringer reporter.

Q. Now, when were these articles, appearing in the September 25th issue, written?

A. When were they written, sir?

Q. Yes.

A. On September 24th, the day before the edition appeared.

Q. September 24th. And you reported certain facts there in the article, not in the editorial but in the article, on the right-hand side of the page. Where did you get those facts that you published there?

(Testimony of Jack D. Daum.)

A. Mainly from Mr. Moore, Neil Moore, the Auditor of the Territory, and from Mr.—well, the majority of the information in the lead story on the right side I obtained from Mr. Moore.

Q. Did you make any check anywhere else? Did you go to the bank? A. Yes, sir.

Q. You checked the ferry account? [338]

A. Yes, sir.

Q. At the B. M. Behrends Bank?

A. Yes, sir.

Q. And did you then go to see Mr. Roden and Mr. Metcalf before you published anything?

A. Yes, sir; I did.

Q. And is the article written on the front page of the Empire of September 25th, labeled "Roden, Metcalf Say 'Nothing Crooked' Here," is that a correct report of what they told you?

A. Yes, sir.

Q. And did Mr. Metcalf, if you remember, say at that time that setting up this special ferry fund and handling the money in the way in which it was handled was a trick of bookeeping?

A. Did you say, did Mr. Metcalf or Mr. Roden say that?

Q. What is that?

A. Mr. Metcalf said that; yes, sir.

Q. Yes; Mr. Metcalf. And you published that in the paper as he said it? A. Yes, sir.

Q. Now, Mr. Daum, in this article on the right-hand page, on the right-hand of the page, you say that "the case closely parallels" the case "of Oscar

(Testimony of Jack D. Daum.)

Olson"; just what did you have in mind in stating that—"in the receipt and [339] disbursement of public funds"?

A. Well, sir, the parallel was very clear and is very clear; that the case of Oscar Olson involved a taking of Territorial monies and putting them into a separate bank account and drawing them out of that bank account unauthorized; this action included the same identical method of handling money in the same unauthorized disbursements and receipt into the fund of monies that should have gone into the general fund, and the withdrawing of monies from that special fund without authorization.

Q. And did you examine the law which you thought at that time was violated?

A. Yes, sir. Mr. Moore showed it to me.

Q. Did you examine Mr. Moore's letter to the Attorney General which you published?

A. Yes, sir.

Q. Calling attention to the parallel?

A. Yes, sir.

Q. And did you believe at the time that these facts were true? A. I certainly did.

Q. And did you believe that such comment, if there is any comment anywhere, was fair and in accordance with the facts, as a reasonable man?

A. Yes, sir. [340]

Q. Now, Mr. Daum, Mr. Roden, I think, or someone, called attention to the fact that in one place here, perhaps two places, you refer to the year 1951—June 6, 1951—that is where you refer in one place

(Testimony of Jack D. Daum.)

to the minutes of the meeting of the Board of Road Commissioners of June 6, 1951, and perhaps in another place—I don't know: I think that is the only place. How did it happen to be 1951?

A. Well, I understand since then that the meeting was in 1952: and, whether it was a typographical error or whether it was an error in my notes, I don't know.

Q. Anyway, do you think the article shows a basis of 1952? A. Sir?

Q. I say, the whole purport of the article is that it was 1952? A. Yes, sir.

Q. And in the article which you published, Mr. Moore's letter, and the facts that he gave you show it to have been the spring of 1952?

A. Yes, sir.

Q. Now, you use the word here, that has been complained of, in the headline "Bare 'Special' Ferry Fund": now, what did you mean by that; what do you mean by the word "Bare"?

A. Disclose, or making public.

Q. That hadn't been made public or disclosed up to that [341] time? A. No, sir.

Q. And that is what you meant by that. Now, complaint is also made of the use of the word "Divert." What did you mean by using the word "Divert" the "'Chilkoot' Cash to Private Bank Account"?

A. The word means to take out of the normal channels or to by-pass or to change the direction of. What I meant was that the money, which Mr.

(Testimony of Jack D. Daum.)

Moore and Mr.—the Attorney General—Mr. Williams had said should have gone into the general fund, ha dbeen put instead into this private bank account.

Q. And you called that in this article a private bank account? A. Yes, sir.

Q. What distinction did you make there and why was that distinction made?

A. Well, sir, the private bank as distinguished from the Territorial Treasury.

Q. You were referring to the account?

A. Yes, sir.

Q. As not an account where public funds are kept; is that right? A. Yes, sir.

Q. Now, Mr. Daum, you published a copy of a check issued to [342] Steve Homer, No. 49, dated August 20, 1952, signed Chilkoot Ferry By Robert E. Coughlin, on the Behrends Bank. Where did you get that check?

A. I believe we obtained it from Mr. Moore, sir.

Q. You think you got it from Mr. Moore?

A. Yes.

Q. Are you sure?

A. No; I am not certain but I am quite—well, I don't know how to say it—I am quite certain but not positive that we obtained it from Mr. Moore.

Q. And Mr. Moore had a number of these checks, did he? A. Yes, sir.

Q. Now, when you set up these articles, including the editorial, did you know anything about the Reeve report at that time?

(Testimony of Jack D. Daum.)

A. No. At the time I wrote the articles?

Q. Yes.

A. No, sir. That story came in that evening from Mr. DeArmond after Mr. Reeve's speech. Mr. Reeve spoke on September 24th in the evening. And I was writing this story that same evening, setting up my front page for the next day, and Mr. DeArmond was to come in that night and write the story and leave it for me for the following day. I did leave a —I left the left-hand column for the story. [343]

Q. And that is how that happened to be there?

A. Yes, sir.

Q. And who wrote the headlines on the Reeve story: do you know? A. Yes, sir; I did.

Q. Now, Mr. Daum, who was publisher of the Empire at that time? A. Mrs. Monsen.

Q. And did you consult Mrs. Monsen about this article or editorial or anything connected with the front page of the paper on that day or that Neil Moore letter? A. No, I did not, sir.

Q. Prior to publication? A. No, sir.

Q. Was Mrs. Monsen always able to be there to be consulted about everything that went into the paper?

A. Well, no, I wouldn't say she was. Mrs. Monsen was working more in the capacity of a reporter. She was publisher of the paper, but we only had two reporters and Mrs. Monsen was filling in as a reporter most of the time.

Q. And when did you—did you call this to her attention at any time before it was published ?

(Testimony of Jack D. Daum.)

A. No, sir.

Q. Did Mrs. Monsen ever tell you to publish any of these articles or did she ever discuss with you any policy [344] with reference to Governor Gruening? Did she ever lay down for you a policy with reference to Governor Gruening? A. No, sir.

Q. I will ask you this question. It might sound leading. But did she at any time tell you that any particular, that some particular, article should not be put in because it was critical of him?

A. No. Mrs. Monsen never told me what to print or what not to print. The only time that I would hear from Mrs. Monsen would be if something that I had published didn't meet with her approval or if she had comment on it. I can't say that she ever criticized an article except just prior to this story, a few days before, I had written a story concerning Governor Gruening's trip northward, and he had said that it was a road inspection trip, and I pointed out in the story that it was a pre-election trip and that he was to speak at different points along the way, and I put "road inspection" in quotes, having quoted Mr. Gruening, and Mrs. Monsen told me after I had published it that it looked as though I was trying to editorialize a bit on the news and that I shouldn't—that she didn't like it; she didn't like the idea of it.

Q. Now, let's go back to this, to the size of the headlines, Mr. Daum. Was there anything unusual about the size of the headlines of that day, September 25th? [345]

(Testimony of Jack D. Daum.)

A. I don't think so, sir.

Q. Did you frequently use headlines of that size and character?

A. Yes, sir. This is the style of make-up that I had been familiar with on all the papers I had worked. There are different styles of make-up, and I had learned and had been acquainted with the Midwestern style, which is always to use a banner headline and to run the story straight down the page, rather than to break it up in what is called the Hearst style, in splashing large headlines down below the fold and what is called trick make-up, but I preferred and that is the type of make-up I used was a banner headline with a story coming straight down out of it and then subheadlines in relation to the story, more of a straight down style that a splash style.

Q. Now, let's go to the check there and to the headlines about "Reeve Raps Graft, Corruption." The plaintiffs complain they were offended in that because it implied they were meant, and that publication of these headlines and the check on the same page of the paper and the position in which they were published injured them. I will ask you if in your experience as a newspaperman it is very often done, that headlines are published and something is directly under the headlines, to which the headlines do not refer, but the article to which the headlines [346] does refer is on the right or left-hand side? A. Yes, it is.

(Testimony of Jack D. Daum.)

Mr. Kay: I object to the continual leading of the witness.

Mr. Faulkner: Well, Governor Gruening testified to this, and I think that—I don't want to lead the witness, but I just asked his opinion as a newspaperman, if that isn't done. I think that is quite proper.

The Court: I do not find it to be objectionable as leading in view of the fact that the witness is testifying as an expert in the reporting business. He may answer.

Mr. Faulkner: I think he did answer.

A. Yes, sir; that is common newspaper practice.

Q. Mr. Daum, has it come to your attention very recently, a newspaper from the States, which exemplifies what you say?

A. Yes, sir. I just ran across a paper yesterday.

Q. I will hand you this paper and ask you if that method is frequently used for setting up news and headlines on the front page of large daily papers?

A. Yes, sir. This illustrates the same point.

Mr. Faulkner: I will show that to counsel (handing proposed exhibit to plaintiffs' counsel). Any objection?

Mr. Kay: I don't know what it illustrates but——

Mr. Faulkner: I think I would like to show it to [347] the Court. I think the Court should see it (handing proposed exhibit to the Court). It illustrates the method of headlines and articles appearing there which——

(Testimony of Jack D. Daum.)

The Court: I think it may be material for the purpose of illustration here. I would suggest though, it may not be necessary to introduce the whole paper.

Mr. Faulkner: No; just the front page.

The Court: Very well.

Mr. Faulkner: Thank you. That will be Defendant's Exhibit K—isn't it?

The Clerk: Defendant's Exhibit K.

Mr. Faulkner: I would like to show that to the jury at this time in connection with the witness' testimony, if there is no objection. There shouldn't be any. Just pass that along (handing exhibit to the jury).

Q. (By Mr. Faulkner): Now, in the article complained of, Mr. Daum, did either of the plaintiffs say to you that they didn't want the checks on the ferry fund to go through the office of the Auditor or make any reference to the Auditor?

Mr. Kay: I object to that as leading. What did they say?

Q. (By Mr. Faulkner): Well, did either of them say they didn't want the Auditor to see these checks or didn't want to put the account through the Auditor's Office? [348]

A. Yes, sir. That is in my——

Mr. Kay: I object.

The Court: Just a moment. I find that to be leading. It is not cross-examination. He may be asked what these parties—you say, the plaintiffs; you mean the two that he has testified he interviewed?

(Testimony of Jack D. Daum.)

Mr. Faulkner: Yes.

The Court: ——what they said with regard to the checks.

Mr. Kay: What if anything.

The Court: If anything.

Mr. Faulkner: Well, the reason, your Honor, I thought it was admissible was that Mr. Roden testified, and I would like to call attention to this particular thing, but I can put the question in that form because it is relevant.

Q. (By Mr. Faulkner): What did they say with reference to this fund and the Auditor's Office?

A. Well, sir, everything they said I have in this article saying "Roden, Metcalf Say 'Nothing Crooked' Here." I went first to Mr. Roden's office after I checked with the bank to make certain that the fund existed and after I checked with Assistant Attorney General Dimond to see that he and Mr. Moore had stopped payment on the fund as Mr. Moore had said. Then I went to see Mr. Roden and asked him what the story was behind this special ferry [349] fund, and he told me substantially as it appears here, going into detail as to the fact the ferry was bought back in May of '51; that there were no appropriations made for operating the ferry: that the Highway fund was being depleted or would have been depleted if it had been used for operating the ferry; and that the money coming in from the ferry couldn't be put in the general fund because it had to be used to operate the

(Testimony of Jack D. Daum.)

ferry, and that, if it had gone in the general fund, they couldn't have got it out to use for operating costs; and that the money had thus been put in this special bank account.

And I asked him if the monies paid out of that special bank account were going through the Auditor, and he said, "No. They can't go through the Auditor." I asked, "Why?" He said that the only thing goes through the Auditor are Territorial vouchers, but he told me to see Mr. Metcalf because Mr. Metcalf was the Highway Engineer and was in charge of this fund, of the Highway fund, so I went down to see Mr. Metcalf. And both Mr. Metcalf and Mr. Roden waved this whole thing aside and said, "There is certainly nothing crooked about this thing. I don't know what you guys are after in this. It is perfectly legal and above board and open to audit at any time." Mr. Metcalf labeled it as just nothing but a trick of bookkeeping, and, well, just substantially [350] what I have in this story. I had to put the two of their stories together because what one omitted the other one included; so, rather than print two stories—Roden said this and Metcalf said this—I put them both together and combined their stories on what happened.

Q. At the time you made up these reports from Mr. Moore and from Mr. Roden and Mr. Metcalf, did you make notes? A. Yes, sir.

Q. And you wrote up the articles from those notes?

A. Yes, sir. I found the copy, or Mrs. Monsen

(Testimony of Jack D. Daum.)

found my old notes in my desk, which I can if I may——

Q. Well, you don't need to read your notes.

A. No; but if I may refer to them.

Q. Mr. Daum, it was after the article was published, you say, that it was called to Mrs. Monsen's attention?

A. Yes, sir. She saw the paper when it came out.

Q. After the paper appeared. That paper shows, the one that was introduced here in evidence, shows it was issued on Thursday, September 25th. Do you know where Mrs. Helen Monsen was that day?

A. On the 25th, the day it came out?

Q. Yes.

A. Yes, sir. She was covering, that morning or at noon, she was covering the Chamber of Commerce meeting in town. Her story appears on Page 3 of this same edition. [351]

Q. She turned that story in that same day?

A. Yes, sir. She wanted to get it on Page 1, and I told her Page 1 was already made up and back in the shop and I didn't even think I could get her story in the paper that day because I wanted to get out early, and she insisted it be put in the paper, so I did get it in on Page 3 or 5.

Q. At the time she brought it in your stories were already set up?

A. Page 1 was already being set up; yes, sir.

Q. She didn't see it? A. No, sir.

(Testimony of Jack D. Daum.)

Q. Mr. Daum, when you were working for the Fairbanks News Miner, did you make an investigation of the Palmer Airport matter?

A. Yes, sir.

Q. And you made some reports and wrote some articles on that? A. Yes, sir.

Q. Now, Mr. Daum, the Governor testified here that the money which was disallowed by the Federal Government in that case, which was made the subject of a report in Congress, was later paid. Do you know anything about that?

A. Yes, sir. I know that it has not been paid.

Q. It has not been paid? [352]

A. No, sir. The funds in question on the land evaluation that the Territory attempted to claim, the funds that were in contest through my story and in Congress, were thirty-eight thousand and some dollars that the Territory had claimed as matching funds for this false evaluation that they put on the airport. That thirty-eight thousand dollars was disallowed by the Comtroller General and has never been paid. The only thing that has been paid was the construction costs.

Q. You have kept in touch with that?

A. Yes, sir. In fact——

Q. Well, that is all right. We don't need to go into detail.

Mr. Faulkner: I think that is all, Mr. Daum. If the Court will pardon me, I just want to look over my notes.

(Testimony of Jack D. Daum.)

(Whereupon, Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; the witness Jack D. Daum resumed the witness stand, and the Direct Examination by Mr. Faulkner was continued as follows:)

Q. Mr. Daum, Mr. Small, a man named Small, testified here yesterday that he worked on the Empire at the time that the articles in question were published. Do you know him?

A. Yes, sir.

Q. Did he discuss these articles with you the night they were published? [353]

A. No, sir. Mr. Small was a reporter, and I was on the desk. There would be no reason for him to discuss them, and he did not.

Q. Did he ever come to you and complain about the articles? A. No, sir.

Q. You were on the desk, and he was reporting?

A. Yes.

Q. Mr. Daum, Mr. Metcalf exclaimed here yesterday of the publication of his picture. Will you tell the Court and jury why you put Mr. Metcalf's picture in the paper on the front page?

A. I thought it was only fair. I put Mr. Moore's picture where I was quoting Mr. Moore, and, if I had Mr. Roden's picture, I would have put his in also to show in fairness that Mr. Roden and Mr. Metcalf were telling their side of the story, but I only had a cut of Mr. Metcalf.

(Testimony of Jack D. Daum.)

Q. Now, after this interview given you by Mr. Roden and Mr. Metcalf, did Mr. Roden later on verify that and corroborate what you had said in the paper?

A. Yes, sir; he did. He gave a written statement to the other newspaper in town, the Independent, in which he said the same things that he had told me, the fact that it was—well, for example, that the ferry had to be kept running because of the tourist —that it had been advertised in the States that the tourists could drive from [354] Juneau north, and they had to have the ferry for that, and the fact that the law did not permit—or that the question came up about this money should go into the general fund but that, if it did go into the general fund, it couldn't be taken out for operating purposes for the ferry so, therefore, it was put in this special fund so it wouldn't have to go into the general fund.

Q. And that other story was published in the——

A. Juneau Independent.

Q. ——Juneau Independent.

The Court: Would you fix the date of that, counsel? I understood from the testimony that the Juneau Independent was organized later.

Mr. Faulkner: Yes, I will.

Q. (By Mr. Faulkner): I hand you a copy of the Juneau Independent, Mr. Daum, and ask——

The Court: Are we correct in that, that the Juneau Independent was not organized?

A. No, sir. It had been organized at the time when I came.

(Testimony of Jack D. Daum.)

The Court: But it had not been published?

A. Yes, sir; it was.

The Court: Oh, it was?

Mr. Faulkner: Oh, yes.

A. They gave me a welcome when I came to town. Yes, sir; this is the edition and it is dated October 16th, three [355] weeks after the publication of the article—1952.

Q. 1952.

Mr. Faulkner: Well, I don't know—have you any objection?

The Court: Well, it certainly would be the best evidence. If the witness is telling about a story which appeared in the paper, the story itself should be the best evidence.

Mr. Faulkner: What is that?

The Court: If the witness is reciting what appears to be a story appearing in the Juneau Independent, the story itself should be the best evidence.

Mr. Kay: I have no objection to it.

The Court: It will be admitted.

Mr. Faulkner: I don't know whether—there might be something in here that would not be admissible, and for that reason perhaps we had better introduce only the pages that refer to the ferry fund, so I will offer Pages 1 and 12—that would be these two pages—if that is satisfactory.

Mr. Kay: As far as I know——

Mr. Faulkner: I don't think there is any other reference to it. I think it all appears on Pages 1

(Testimony of Jack D. Daum.)

and 12 of the issue of that day. That would be Defendant's Exhibit——

The Clerk: L.

Mr. Faulkner: ——L. [356]

Mr. Kay: Apparently, the rest of the paper has nothing further to do with it.

The Court: Then Pages 1 and 12 may be admitted in evidence.

The Clerk: Defendant's Exhibit L.

Mr. Faulkner: I think that is all, Mr. Daum.

Cross-Examination

By Mr. Kay:

Q. Mr. Daum, you say that Mr. Small did not discuss with you any of these articles or the editorial appearing on the front page, on the evening of the 24th, the night before they were published?

A. I said that: yes, sir.

Q. Was Mr. Small in the office that night, Mr. Daum?

A. Not to my recollection, at least not while I was making up the page. He may have come in later on after I had left, because Johnny often did that: covering sports or night stories, he would come in late and write a story.

Q. Well, on the evening of the 24th did you have a proof of the front page or a partial proof of the front page prepared at that time?

A. I didn't have a full page proof: no, sir. I had the galley proofs, but that is the single columns

(Testimony of Jack D. Daum.)

of type as they were set up by the machines, and I had my dummy [357] made up.

Q. Did you have your dummy made up or partially made up, Jack?

A. I had the dummy all made up as far as Page 1 was concerned.

Q. The dummy means a blank sheet of paper with your proofs—that is, your first run off the press to correct typographical errors is the proof, isn't it?

A. The proof is the first run off to correct typographical errors. The dummy is a blank sheet of paper just showing the headlines and the positions of the stories.

Q. Don't you usually paste your proofs——

A. No.

Q. You don't paste your proofs——

A. No. The dummy is a small piece of paper about tablet size.

Q. But you did have your column proofs for your stories?

A. Yes, sir. They were on the hook.

Q. Now, was Jim Beard there that night?

A. He wasn't there while I was making up. He may have dropped in later. I don't know. I don't remember whether he was or not.

Q. Do you recall discussing this sensational story or any portion of it with Jim Beard that evening?

A. I don't recall having discussed it with him. I may have [358] mentioned it to him, that that was

(Testimony of Jack D. Daum.)

what was coming out the next day, but I don't think there was any great discussion about it.

Q. Well, now, what time of the day, Mr. Daum, on the 24th did you have your interview with Neil Moore; do you recall?

A. Well, I saw Neil first—in fact I think I interviewed Neil on the 23rd and checked the bank on the 23rd, and it was the following day, the 24th, that I interviewed Mr. Roden and Mr. Metcalf and Mr. Dimond, so that it would be, I am quite certain, the 23rd I interviewed Mr. Moore.

Q. All right. How did you contact Mr. Moore? Did Mr. Moore call you and tell you he had a story for you, or did you——

A. No, sir. I was in the habit, when I was covering the Federal Building, of dropping in all of the offices, and I had talked to Steve Homer sometime before this, Steve Homer being the former mate of the Chilkoot Ferry, and Steve had told me that there was a story brewing on the ferry and to keep tab on it, that there was something going to break on this ferry.

Q. How long before this issue of September 25th was that discussion with Steve Larsson Homer?

A. Oh, it would be at least a week.

Q. Did Steve Larsson come to the paper and tell you that, [359] or did you happen to run into him?

A. No. As I remember, Steve came into the paper to pay for some advertising that had been done for something or other, and I first met him there when Mrs. Monsen introduced him to me at

(Testimony of Jack D. Daum.)

the newspaper, and I was talking with him then about the operation of the ferry, nothing in mind of a story. Then he told me to keep tabs on that ferry because there was something going to break on it pretty quick, so in the course of events as I saw Neil I asked him what was happening on this ferry fund, and he said, "Well, I think there is going to be a story there, but wait; I am checking it out," or something to that effect, and on the 23rd when I went in to see him I asked him if there was any news, and he said, "Well, you might be interested in this ferry fund," so he started breaking it to me.

Q. Then Neil had evidently talked to Steve Larsson Homer prior to the time that you talked to Steve about it?

A. Yes, sir. He had talked to him the month before.

Q. How long before?

A. The month before, in August.

Q. Sometime in August of 1952. When did you write your story, your lead story, in the right-hand column? I understood your leg work was done around the 23rd and 24th. At what time of the day, approximately, did you [360] write that story, Jack?

A. I wrote it in the evening; after I had gotten the paper of the 24th off the press and had gone out and had dinner, I came back to the office and I had my notes complete from my interviews and sat down and wrote the stories and the editorial.

Q. By "evening," do you mean afternoon or——

A. Well, yes; it would be four o'clock, five

(Testimony of Jack D. Daum.)

o'clock. The paper came out around one or two, and I would always go out and grab a bite to eat and come back to the office, so it would be around four or five o'clock.

Q. And you had these proofs then during the evening. Did you discuss and go over the proofs with Beard? A. No. I don't believe I did, sir.

Q. Did Beard assist you in any way in laying out the front page dummy?

A. No; that wouldn't be very likely because I was handling the desk work at the time, Mr. Kay, and no, he did not assist me.

Q. He took no part in the preparation of the front page nor the layout of the paper of that day?

A. No, sir.

Q. You did that entirely by yourself?

A. Yes, sir.

Q. And Small, it is your testimony, you have no recollection [361] of his even being in the newsroom that evening?

A. I don't recall him having been there at all.

Q. At that time you were a reporter, or, you say, you were on the desk; which was it?

A. Well, actually, both, Mr. Kay. It is a small newspaper, and we had Mrs. Monsen and two other people working for the paper, and at the time I got there Mr. Beard had been on the desk, but he had had no previous newspaper experience, and I took over the desk operation, so that I would go up and cover the Territorial offices in the morning, come back by ten o'clock or ten-thirty, write my

(Testimony of Jack D. Daum.)

stories, take the stories from the other reporters, dummy up Page 1, and get the paper out. Mr. Beard, when I got there, resumed his position as business manager.

Q. Ordinarily then you wouldn't get your dummy-up done until after you had covered the Federal Building in the morning?

A. It would vary; yes, sir. If I had enough material the night before to make up my dummy, why, it would speed getting the paper out if I got the dummy out the night before and keep the back shop happy.

Q. Now, if Mr. Small testified that he saw a page proof of the front page of September 25th in the newsroom on the evening of September 24th, would he be telling the truth?

A. A page proof, sir?

Q. Yes. [362]

A. No, sir; he couldn't have been. I didn't have a page proof until the following morning.

Q. Then, if he testified as he did, Page 9 of his deposition: "Yes, I did. I saw what we call a page proof of it." "You call it what?" "Page proof."—in the newsroom on the night of the 24th, he was mistaken or not telling the truth; is that correct?

A. That is correct. I think Mr.—I think Johnny was talking about the dummy that he might have seen on my desk.

Q. I thought you said a dummy was a small page without any articles?

(Testimony of Jack D. Daum.)

A. Yes; that is right; but Johnny was—I mean, he is not a desk man, and he may have called the dummy the page proof.

Q. Well, if he testified as follows: "I don't recall exactly. I was coming in, as was my custom, to do work that I hadn't gotten done earlier in the day and I think, if I recall, that I was at my typewriter for awhile and shortly after that I noticed Beard and Daum reading this page proof over at the managing editor's desk and I walked over to see what they were discussing and what they were doing."—was Mr. Small testifying truthfully there?

A. Mr. Kay, I don't know why Mr. Small would say that, because it is just not true.

Q. It is just not true?

A. Yes, sir; it is not. [363]

Q. Did you have any—and then he goes on—"I will ask you whether or not"—the question is—"whether or not you had any discussion with Mr. Beard concerning this page proof?" Answer—"Yes, I did." Did Mr. Small have any testimony, have any discussion with Mr. Beard concerning this page proof?

A. I don't know. He may have talked to him.

Q. In your presence?

A. No; not in my presence; no, sir.

Q. Now, let me ask you this. In your presence there, and in the presence of Small, at that time, the evening of the 24th, when you were discussing, or when Mr. Small claims that the page proof was being discussed, I will read you a portion of Mr.

(Testimony of Jack D. Daum.)

Small's testimony and ask if it is true and correct: Q. "Now, when Mr. Beard said, 'What do you think of this,' did he say anything else prior to your reading it?"—A.—this is an answer by Mr. Small; this is at the desk, the managing editor's desk—"Well, he made several comments and the one I recall, of course, is 'We have got the S.O.B. where we want him,' or something to that effect." Did Mr. Beard make any statement like that in your presence—— A. No, sir.

Q. ——there at the managing editor's desk?

A. No, sir. [364]

Q. Well, then, it is your testimony that at least in your testimony that at least in your presence Mr. Small had no discussion whatever concerning any of these stories that appeared on the front page concerning the Chilkoot Ferry, the front page of September 25, 1952, with you or Mr. Beard, Mr. Beard in your presence, that is, on the evening of the 24th? A. That is correct, sir.

Q. Now, and I believe it was your testimony, was it not, Mr. Daum, that Mrs. Monsen knew nothing about this story until it appeared, this material that appeared on the front page in regard to the Chilkoot Ferry?

A. As far as I know, she knew nothing about it. She got nothing about it from me. I didn't talk with her about it.

Q. In other words, Mr. Daum, you—let's see—you had been alerted on this by Steve Larsson

(Testimony of Jack D. Daum.)

Homer about a week prior to September 25th; is that correct?

A. Sometime about that time; yes, sir.

Q. And then on the 23rd you were told by Neil Moore, "Here is a story on the ferry," and given the material from Neil Moore; is that correct?

A. Not exactly in those words; but I got it from Mr. Moore by questioning him; yes, sir.

Q. All right. You questioned Mr. Moore and got all the material from Neil Moore on the 23rd of September? [365] A. Yes, sir.

Q. And then on the 24th of September you made your check, either—on the 23rd was when you checked at the bank, I believe? A. Yes, sir.

Q. And then on the 24th you interviewed Roden, Metcalf and John Dimond; is that correct?

A. I don't know if I saw Mr. Dimond. I know, Mr. Roden and Mr. Metcalf, I interviewed them the same day. I may have talked to Mr. Dimond the day before.

Q. I see. Well, in other words, on either the 23rd or 24th you completed your complete investigation—— A. Yes, sir.

Q. ——by interviewing Dimond, Roden and Metcalf? A. Yes, sir; I did.

Q. And then you proceeded to write the stories and editorial on the evening of the 24th?

A. Yes, sir.

Q. So that you had page proofs before—I mean, not page proofs but proofs before you went home?

A. I had galley proofs——

(Testimony of Jack D. Daum.)

Q. Yes.

A. ——of most of it. The linotype operators were getting into overtime, and I don't think that I had galley proofs of the editorial. I turned the editorial out and [366] I don't think I had galley proofs of the editorial until the following day, but I had my dummy out and I had all of the Page 1 out except Bob DeArmond's story and, possibly, except the editorial, but the majority of it was out to the shop and set in type.

Q. And then you published this issue of September 24th at your usual publication time on the early afternoon of Thursday, September 25, 1952; is that correct?

A. I published our 24th edition, you say?

Q. No. Your edition of the 25th came out with this material in it at about the usual publication time in the early afternoon?

A. I was about an hour early on it. I got it out about an hour early.

Q. About noon then?

A. Noon or one o'clock, thereabouts.

Q. It must have been right after the Chamber luncheon if Helen's story got in? A. Yes, sir.

Q. That would have to be set up and so on and so forth? A. It would have to be set in type.

Q. And proofed and etc.?

A. We skip proofreading occasionally.

Q. And that—it is your testimony then that, having uncovered this story on the 23rd, carried on your investigation [367] on the 24th, and published the information on the 25th, during all of that time

(Testimony of Jack D. Daum.)

you did not call any of it to the attention of the publisher of the newspaper, Helen Troy Monsen, nor discuss any portion of it with her?

A. There was no reason to. No, sir; I didn't.

Q. You had been on the newspaper on September 25, 1952, about thirteen days, had you not?

A. Thirteen—fifteen days; something like that; yes, sir.

Q. And yet you say you considered this a very important story?

A. I considered it a good story; yes, sir.

Q. Wouldn't you say you considered it, as a matter of fact, a tremendous scoop, in newspaper words?

A. You can't very well score a scoop when you are the only daily in town, Mr. Kay.

Q. Well, it was a sensational story; would you say that?

A. I would say it was a—I think your first word was right. It was an important story.

Q. And yet it is your testimony that you did not discuss any portion of it with the publisher of the newspaper during the three days prior to publication? A. Yes, sir.

Q. Now, you had a business manager, or managing editor or whatever his official title may have been—Jim Beard? A. Yes, sir. [368]

Q. Did you discuss any portion of this story with Jim Beard on the 23rd of September, 1952, at the time that you had your, or after you had your interview with Moore?

(Testimony of Jack D. Daum.)

A. Yes, sir. I told him the story I was after and the story I was digging out and told him what I was after.

Q. And did you have a further discussion with him on the 24th about the story?

A. As to discussion, Mr. Kay, I would say—I don't know. I don't recall any specific discussion.

Q. Did he go over the material with you?

A. Over my material?

Q. Yes. A. No, sir.

Q. You didn't go over the facts or alleged facts, which you had discovered, with Mr. Beard?

A. No, sir. I briefly outlined what the story was to him, and he said, "It sounds like a good one," or something like that.

Q. He didn't say, "We have got the S.O.B. now," though? A. No, sir.

Q. And then it is your testimony that you interviewed—did you discuss your interview with Roden or Metcalf with Beard?

A. I don't know if I did or not, Mr. Kay. I don't recall.

Q. Did you discuss your editorial, "Start Talking, Boys," [369] with Beard?

A. I may have. I don't recall.

Q. Did you discuss the parallel, your use of the parallel, of this situation with the Oscar Olson case with Mr. Beard?

A. No, sir. There was no need to. I don't believe I did; I mean, that is three years ago, Mr. Kay. I

(Testimony of Jack D. Daum.)

don't recall if I specifically discussed any of the points with him or not.

Q. Well, now, it is your testimony, isn't it, Mr. Daum, that you are the author of the editorial, of the front page editorial, entitled "Start Talking, Boys," on the front page of September 25, 1952?

A. Yes, sir.

Q. Did anyone else on the newspaper assist you in any way in the writing of that editorial?

A. No, sir. I might add—nobody assisted me in anything, in any of my writing on the newspaper.

Q. An editorial, Mr. Daum, as a newspaperman you can testify, I believe, that an editorial expresses the official policy of the paper, does it not?

A. Yes, sir; that is true.

Q. And so this editorial then expresses the official policy of the Daily Alaska Empire?

A. Insofar as I represented the Empire in—— [370]

Q. You had complete authority to write editorials, lay out the front page, write stories, lay out the headlines, and issue the paper without supervision or check by any other person, did you not?

A. Yes, sir; that is true.

Q. And you did so? A. I did so.

Q. Now, you testified—you wrote in your story, did you not, the following paragraph—you may check with a copy if you wish—the fourth paragraph; I think you will recognize it all right; the fourth paragraph in your lead story, you wrote, did you not: "The case closely parallels that of

(Testimony of Jack D. Daum.)

Oscar Olson, former Territorial Treasurer who is now serving a prison term at McNeil's Island penitentiary for violating the law in the receipt and disbursement of public funds." You wrote that language, did you not? A. Yes, sir.

Q. Now, what check had you made on the conviction and sentence of Oscar Olson, former Territorial Treasurer, on his previously entered plea of guilty, if any?

A. What check had I made on the Olson case?

Q. Yes.

A. Well, only to the extent of Mr. Moore showing me the statute under which Mr. Olson was sentenced and pointing out that this was the same statute that was being [371] violated in this story——

Q. I see.

A. ——and that the method of depositing and withdrawing of funds in a private bank account was the same.

Q. Mr. Moore pointed that out to you?

A. Yes, sir.

Q. Well, you knew, did you not, that Oscar Olson had converted the Territorial money to his own use, had actually embezzled thousands of dollars of Territorial money and put it in his pocket and spent it for his own purpose?

A. I recall the story; yes, sir.

Q. You knew that, did you not?

A. From reading the paper; yes, sir.

Q. And you knew that that was the fact or the

(Testimony of Jack D. Daum.)

reason or the basis upon which Oscar Olson had been sentenced, convicted and sentenced, and sent to McNeil Island Penitentiary, did you not?

A. Yes; I knew he had been convicted under this statute covering embezzlement.

Q. Of embezzlement of public funds for his own use? A. Yes, sir.

Q. Stealing?

Mr. Faulkner: Pardon me——

Q. You knew that, did you not?

Mr. Kay: This is cross-examination. [372]

A. Yes; I knew that the statute—I knew the statute under which he had been convicted, Mr. Kay.

Q. (By Mr. Kay): And then it was your intention, was it not, in comparing this matter to Oscar Olson to imply that these men had also been guilty of converting public money to their own use?

A. No, sir. There is no place in that article that I say they converted money to their own use.

Q. But you said, you suggest that it "closely parallels" the case, "that of Oscar Olson"?

A. In the receipt and disbursement of public funds.

Q. Oscar Olson, however, you have just admitted, was convicted of embezzling and converting this money to his own use and putting it in his pocket and stealing it from the Territory?

A. And that is where the parallel ends. It is a close parallel but not—it is a close parallel in that

(Testimony of Jack D. Daum.)

the same method was used and the same statutes applied.

Q. In other words, the only parallel, Mr. Daum, as a matter of fact, is that money went into a bank and money came out of a bank?

A. No, sir; that is not the only parallel in my estimation, and I didn't believe that was the only parallel at the time.

Q. You say Mr. Moore showed you the law in that regard? [373] A. Yes, sir.

Q. Mr. Moore had the law all laid out and prepared at the time you got there?

A. No, sir. I asked him for it.

Q. He had it accessible? A. Yes, sir.

Q. Did you go over the law with Mr. Moore?

A. I just asked him what section it was that this came under, and he pointed it out to me, and I asked him how the methods compared, because I wasn't familiar with the details of the Olson case so far as how the money was handled, and he pointed out that the same method of taking Territorial money, putting it in a bank account and taking it out without the Auditor's knowledge, unauthorized, was the same method.

Q. And that is where the parallel ended?

A. Yes, sir.

Q. In other words, at that point Mr. Olson put the money in his pocket or made off with it or did whatever he did—we don't know what he did with

(Testimony of Jack D. Daum.)

it, perhaps—and you didn't intend of course to imply that these men did that?

A. No, sir. If I had, I would have said so.

Q. Well, that would have been clearly and obviously a gross libel if it was not true, would it not? [374] A. If not true?

Q. If you had said that?

A. If I had said that? If it weren't true, sir, I wouldn't have said it.

Q. Now, you said that you got this check, which you photostated and printed on the front page, Mr. Daum, you believe that you got it from Mr. Moore?

A. I believe I got the photostat from Mr. Moore; yes, sir.

Q. The photostat or the check?

A. The photostat.

Q. How did you happen to select this particular check from the number of other checks that Moore had?

A. This was the only check I had seen, sir.

Q. Did you not testify on direct examination that Moore had a number of these checks?

A. No, sir. This is the only check I saw.

Mr. Kay: How much trouble would it be for you, Miss Maynard, to check Mr. Daum's testimony to see if he did not testify on direct examination that Moore had a number of these checks? Will you make such an examination during the lunch hour please and see if you can find that point in his testimony? I believe it was about midway through

(Testimony of Jack D. Daum.)

his direct examination by Mr. Faulkner, if my notes are correct and of course they may not be.

The Reporter: Yes, sir. [375]

Q. (By Mr. Kay): Now, Mr. Daum, is it your testimony that Mrs. Monsen never laid down or advised you in any way as to the editorial policy of the Empire with regard to Governor Gruening and his administration?

A. Not specifically Mr. Gruening; no. The only policy I got from Mrs. Monsen was over that period of two weeks that I worked for her and when she would—I would get policy from her when she would either compliment me on a story or telling me it was good writing or, as I said, when she criticized me for having placed this road inspection trip in quotes, but she never directly come out and said, "Now, the policy of the paper is" this or any such thing. She is not that type.

Q. Well, would it be your testimony then that you at the time you published this edition of September 25, 1952, you had no idea as to whether the attitude of the publisher of the Empire toward the Gruening administration was favorable or unfavorable?

A. Well, sir, of course I knew that the Daily Alaska Empire had published the Palmer story and had been critical of the Governor on that story.

Q. They have been critical of the administration practically on every item over a period of years, have they not?

A. Just as had the other papers that I worked

(Testimony of Jack D. Daum.)

on—the News Miner and the Ketchikan News and the Daily News in [376] Anchorage, they were all critical of the Gruening administration.

Q. Did you work on the Ketchikan News?

A. No; not work with it, but associated.

Q. The Daily News in Anchorage?

A. Stringer; I wrote stories for them; yes, sir.

Q. Your employment actually was for the Fairbanks Daily News Miner?

A. Daily News Miner; yes, sir.

Q. Now, the Fairbanks News Miner was at that time owned by that distinguished old Alaskan, Cap Lathrop? A. Yes, sir.

Q. Later, it has been sold, or since your time it has been sold, has it not? A. Yes, sir.

Q. And when you worked for the News Miner —I may be going far afield there. Well, in your work on the News Miner then you were acquainted with the editorial position or policy, let's say, of the Alaska Daily Empire, or Daily Alaska Empire, as being comparable to that of the News Miner with regard to the Gruening administration?

A. Yes, sir. We received all the Territorial newspapers on an exchange basis and we knew the editorial policies of each; yes, sir.

Q. Then it would not be—in going to work for the Empire you [377] would expect to follow, generally, the editorial policy of the paper for which you worked, would you not, Mr. Daum?

A. Generally; yes, sir.

Q. So in your position, coming to the News

(Testimony of Jack D. Daum.)

Miner, or to the Empire from the News Miner, and being acquainted with the Territorial political machine, machinery, it would not be necessary to indoctrinate or instruct you on policy to the extent that it might be necessary with regard to someone coming up from the "Outside" cold; I mean the editorial policy, the general policy of the paper; it would not be necessary, would it?

A. No, sir. Mr. Kay, so far as policy goes, with any newspaper the major point of policy is whether or not you report the news fairly or not. That is the first basis of reporting.

Q. Right.

A. And the two papers in that respect had the same policy.

Q. Well, there is more than that to editorial policy, is there not? Isn't there the position of whether or not you are, for example, generally on one side or the other as far as the political parties go?

A. No, sir. As far as that goes, the Daily Alaska Empire was a Democrat newspaper and the News Miner was Republican, but we agreed on a number of points. [378]

Q. You agreed on one thing and that is on opposition to the Gruening administration?

A. No, sir. We agreed on specific points that would come up where the administration had either gone far afield from the law or committed acts which were subject to public scrutiny and brought those acts out.

(Testimony of Jack D. Daum.)

Q. Your position then is that there was no general policy of the Empire in over-all opposition to the Gruening administration, so far as you know?

A. Not opposition, sir. The fact that the administration committed many acts which were brought to the public attention in the press may have made it—you can't construe that to be a policy, the fact that these different stories were stories concerning acts of the administration. There was no other administration to print stories about.

Q. And so you are not then—to get back to the question again—you are not aware of any general editorial policy of the Daily Alaska Empire in opposition to the Gruening administration, or are you?

A. I am in respect to certain cases which have come up—the Palmer Airport case and the illegal session.

Q. And with respect to almost every attitude of the administration?

A. No, sir. There were numerous attitudes that the Governor [379] had that the Empire was favorable to.

Q. I am almost tempted to ask you if you can name one. You probably could name one. Now, you testified, did you not, that on the 24th, I believe, of September you interviewed both Henry Roden and Frank Metcalf as to the story which you had gleaned from Neil Moore? A. Yes, sir.

Q. And you are sure of that, that you interviewed both of them, Mr. Daum?

(Testimony of Jack D. Daum.)

A. That I interviewed both? Yes, sir.

Q. Is it possible that you are mistaken and that you interviewed Mr. Metcalf on that day and did not in fact interview Mr. Roden until the day following the appearance of the issue of September 25th?

A. That is impossible, sir, because it was Mr. Roden that told me to go see Mr. Metcalf.

Q. Well, you did again interview Mr. Roden on the 26th, did you not? A. Yes, sir.

Q. And you published another story on the 26th covering that interview with Roden? I will show it to you and ask you if you recall it.

A. Yes, sir.

Q. Now, that was gained by you, written by you, was it? A. Yes, sir. [380]

Q. And written by you on the basis of an interview with Roden on or about the 25th or 26th? It appeared in the edition of the 26th.

A. Yes, sir.

Q. So it was an interview with Roden after the appearance of this article?

A. This was; and I interviewed him every day after that for about a week.

Q. This is specifically after the interview with —I mean, after the appearance of the September 25th issue? A. Yes, sir.

Mr. Kay (Handing proposed exhibit to defendant's counsel): I offer this in evidence.

The Clerk: Plaintiffs' Exhibit No. 10.

(Testimony of Jack D. Daum.)

The Court: If there is no objection, it may be admitted.

Q. (By Mr. Kay): Now, did you in your interview with Mr. Metcalf question him as to the legality of the method of operation which had been adopted with reference to the ferry, Mr. Daum?

A. May I look at my notes, Mr. Kay?

Q. If it is necessary for you to look at your notes to refresh your recollection, you of course may.

A. Yes, sir; because he said something about the Attorney General having said something in that meeting concerning [381] the legality of it. (Looking at notes.) It was the Attorney General advised —let's see. The receipts would have been enough to pay the operating expense; the receipts from the ferry, he said, if he could have used the receipts from the ferry directly back to pay the operating expense of the ferry, they would have been enough to run it on, but the Attorney General advised that they couldn't, and it had to go in the general fund; normal channels couldn't be used—and then the only other reference to legality was where he said there was nothing crooked at all, aboveboard, open to audit at any time.

Q. Now, you are sure, are you, that Mr. Metcalf used the words that you have placed in quotation marks in your headlines, the words "Nothing Crooked"?

A. Yes, sir. As a matter of fact, both he and Mr. Roden.

(Testimony of Jack D. Daum.)

Q. Both he and Mr. Roden? A. Yes, sir.

Q. They both happened to hit on that happy phrase?

A. Well, I believe Mr. Roden expressed that feeling first, and, when I was talking to Mr. Metcalf, I may have told him that I talked to Mr. Roden and what he had to say, and Mr. Metcalf might have said, "That is right."

Q. You talked to Mr. Roden prior to talking to Mr. Metcalf? A. That is right; yes, sir.

Q. Now, you are positive, are you, that Mr. Metcalf used the [382] phrase "trick of bookkeeping"? A. Yes, sir.

Q. That is a quotation? A. Yes, sir.

Q. That is directly a quotation, words of his?

A. Yes, sir. He said, "Mr. Roden felt that a special fund was the only way of handling these funds instead of them going in the general fund. Mr. Williams had no objection. It was unanimous. Mr. Daum, it is just a trick of bookkeeping. They had to be kept out of the general fund or we couldn't use them; they had to be kept out of the general fund or they couldn't be used," something like that.

Q. Where did you get those notes to which you are referring, Mr. Daum?

A. These I left in my desk when I left the Empire.

Q. And when did you leave the Empire?

A. In '53.

Q. In 1953? A. Yes.

(Testimony of Jack D. Daum.)

Q. And when did you next see those notes?

A. When Mrs. Monsen handed them to me when I came down to Ketchikan.

Q. That is a couple of days ago?

A. Yes, sir. [383]

Q. Do you have any idea of how they happened to be preserved? A. Yes.

Q. Where did you leave them, as far as you can recall? A. In my desk drawer.

Q. When you finish writing a story, do you ordinarily save your notes?

A. No, sir; I don't. In fact, this isn't all of them.

Q. What?

A. This is not all of my notes. This is just what I happened to throw into the drawer, I guess.

Q. And Mrs. Monsen happened to find them?

A. Yes, sir.

Q. They were prepared at the time of these interviews; is that your testimony?

A. Yes, sir.

Q. Now, in your discussion with Mr. Roden did you ask Mr. Roden concerning the legality of this method of operation?

A. I don't know if I asked him specifically about the statute. I believe he prefaced his remarks with the fact that there was nothing crooked about the whole thing; that it was all open and aboveboard, or words to that effect; so I just asked him about the facts of the matter rather than his opinion as to the legality of it.

(Testimony of Jack D. Daum.)

Q. When you went in to see Mr. Metcalf and asked him about [384] this, did he produce a copy of the minutes of the Board of Road Commissioners? A. Yes, sir.

Q. For June 5, 1952? A. Yes, sir.

Q. Now, Mr.—well, you had only been there about thirteen days; that is true. Had you had occasion to visit Mr. Metcalf's office prior to the time that you went to see him on this occasion?

A. Yes, sir; just about every day.

Q. Every day?

A. Just about every day; yes, sir.

Q. Now, when Steve Larsson Homer brought up this matter about "Watch for a story on the ferry fund," you knew that Mr. Metcalf was, generally, in charge of the operation of the ferry, did you not, at that time? A. No, I didn't at that time.

Q. You didn't know that the Board of Highway Commissioners ran the ferry?

A. No, sir; I didn't.

Q. Didn't Steve Larsson Homer tell you that?

A. No. In fact he just mentioned it briefly and said he had been working for the ferry and "By the way, you ought to watch that. There is going to be something come up in that. See Neil Moore. He has got all the facts." [385]

Q. At that time did you speak to Neil Moore about it?

A. No, sir; I didn't. I just let it drag until it came to my mind.

Q. Until Moore brought it up?

(Testimony of Jack D. Daum.)

A. No. Until I asked Moore about it. When you are handling five or six stories a day, you don't try to crowd any more work on yourself than you can help.

Q. Well, you let it go for about a week then, until you happened to ask Moore about it?

A. Yes, sir.

Q. Did you know that Metcalf was on that Board?

A. When Mr. Moore told me; yes, sir.

Q. You didn't know it prior to that time?

A. No; I didn't.

Q. Did you know the Governor was on that Board?

A. The Governor is chairman of all boards.

Q. Well, you interviewed the Governor just a few days prior to this time about his trip in leaving Juneau, did you not? A. Yes, sir.

Q. And that was after you talked to Steve Larsson Homer? A. I believe it was.

Q. Did you bring up this question, that you understand there was something brewing on the Chilkoot ferry, or ask him about that? [386]

A. No, sir. I didn't even know the Governor was involved.

Q. Well, you knew he was the chairman of all the boards, you just said.

A. Yes. You asked me if I knew that he was on that Board. I said he was chairman of all boards. But I didn't know at the time that the Board was involved in the ferry. I just didn't know——

(Testimony of Jack D. Daum.)

Q. You didn't know who ran the ferry?

A. Sir?

Q. You didn't know who ran the ferry?

A. No, sir; just that the Territory did.

Q. I believe in that connection you testified, did you not, that Mrs.—that the one occasion on which you were called, that Mrs. Monsen had occasion to perhaps express the editorial policy of the Empire to you, was in connection with a story that you wrote at that time about the Governor leaving Juneau on this trip? A. Yes, sir.

Q. And I believe you said, did you not, that in that story that you had put the words "road inspection tour" or words to that import in quotation marks with the implication that that was a cover-up for a political junket? A. Yes, sir.

Q. And that Mrs. Monsen criticized you for that? A. Yes, sir. [387]

Q. Well, did she criticize you for repeating it in your story on September 25th?

A. No, sir, she didn't; that I know of.

Q. In other words, you did repeat it in your story on September 25th, did you not?

A. Yes, sir.

Q. You again characterized the Governor; you said that the Governor "has not returned from his pre-election 'road inspection' tour and was not available for comment today." A. Yes, sir.

Q. So you in that instance not only set the policy of the paper but flouted what the publisher had warned you about?

(Testimony of Jack D. Daum.)

A. And, even if I did, I had an argument with Mrs. Monsen on that, and I still believe that I am right.

Q. I see. In other words, it is your testimony that Mrs. Monsen in this regard was more interested in protecting the Governor of Alaska than you were?

A. No, sir. She was interested in protecting the integrity of the paper.

Q. Well, more interested in eliminating editorializing from the news columns of the Empire?

A. Yes, sir.

Q. That is editorializing, is it not?

A. Yes, it is. [388]

Q. And, as a newspaperman, you know that editorializing in news columns is bad journalism, is it not?

A. I wouldn't say it was bad journalism. It is——

Q. It is considered bad journalism, is it not, by most respectable newspapermen?

A. To an extent; yes.

Q. Editorials are to be put in editorials, and news items are to be put in news articles?

A. Yes, sir.

Q. And that is editorializing a news item, is it not? A. Yes, sir.

(Whereupon, the trial was recessed until 2:00 o'clock p.m., November 17, 1955, and resumed as per recess, with all parties present as

(Testimony of Jack D. Daum.)

heretofore and the jury all present in the box: the witness Jack D. Daum resumed the witness stand, and the cross-examination by Mr. Kay was continued as follows:)

Mr. Kay: I wonder if the Court reporter was able to locate during the lunch hour the reference —Mr. Daum's direct examination about which I had inquired previously. Were you, Miss Maynard?

The Court Reporter: Yes, sir.

Mr. Kay: I wonder if you would read the portion of the testimony in that regard?

The Court Reporter: Yes, sir. "Q. Now, Mr. Daum, you published a copy of a check issued to Steve Homer, No. 49, [389] dated August 20, 1952, signed Chilkoot Ferry by Robert E. Coughlin, on the Behrends Bank. Where did you get that check?" "A. I believe we obtained it from Mr. Moore, sir." "Q. You think you got it from Mr. Moore?" "A. Yes." "Q. Are you sure?" "A. No; I am not certain but I am quite—well, I don't know how to say it—I am quite certain but not positive that we obtained it from Mr. Moore." "Q. And Mr. Moore had a number of these checks, did he?" "A. Yes, sir."

Q. (By Mr. Kay): Now, is that——

Mr. Faulkner: What was that last question and answer?

The Court Reporter: "Q. And Mr. Moore had a number of these checks, did he?" "A. Yes, sir."

(Testimony of Jack D. Daum.)

Q. (By Mr. Kay): Is that correct, Mr. Daum?

A. Yes, sir. What I should have said was photostats. He had a number of photostats of the same check, and I got the photostat from him. I only saw the one check.

Q. I see. Then what you meant was that he had a number of photostatic copies of the same check?

A. Yes, sir.

Q. And that is your explanation?

A. Yes, sir.

Q. Now, you state that the Laredo, Texas, paper, which you happened to run across, is an example of the same thing as the headline over the check in question in this case; [390] is that correct, Mr. Daum? A. Yes, sir.

Q. Then it would be your interpretation of this, that the headline "Soviet Peace Proposal Rejected," appearing over a picture of Ike and Mamie leaving the hospital, would be interpreted to refer to the headline "Soviet Peace Proposal" in the same way that the headline "Reeve Raps Graft, Corruption" would be in relationship to the photostatic copy of the check?

A. Just the opposite. I mean to infer that you do not ordinarily associate the picture with the line, but it is a common practice to put your four-column banner or your headline, to extend it over four columns but still have different stories or pictures underneath it that have no connection with it whatsoever.

(Testimony of Jack D. Daum.)

Q. Isn't it common to have your story to which the headline refers in the right-hand column of the headline? A. No, sir.

Q. Common practice?

A. No, sir. Here is one here that reads out of the left-hand. It is either way.

Q. Then it is your testimony that these are similar situations?

A. Similar situations in that the headline has no bearing on the picture which is beneath it. [391]

Q. Of course the "Soviet Peace Proposal Rejected" does have a subheadline, does it not—"Conference Hits Snag on Disarmament"?

A. Yes, sir.

Q. The story "Reeve Raps Graft, Corruption" does not have a subheadline?

A. It did have until I found Mr. Reeve's picture and took the subheadline out to make room for the picture.

Q. As published it does not have a subheadline?

A. Correct.

Q. When was the headline "Reeve Raps Graft, Corruption" written, to the best of your recollection, Mr. Daum?

A. That is the story that Mr. DeArmond turned in the night before, and I don't believe I wrote the headline until the next day. I dummied it in but didn't write the headline until the following day.

Q. Then you are sure in your own mind, are you, that the headline was not written the night before, on the evening of September 24th?

(Testimony of Jack D. Daum.)

A. Quite certain; yes; I don't want to swear to that, but, as I remember, it was written the next morning.

Q. Now, then, if Mr. Small testified that in the discussion with Beard—Mr. Beard, Mr. Small and yourself—that he pointed this particular headline out; in other words, as he said: "I recall I pointed out to Beard that he had [392] in the make-up heads such as that, 'Reeve Raps Graft, Corruption' " alongside of the other headlines; Mr. Small would not be telling the truth; is that correct?

A. Sir, he couldn't be, because we didn't have a page proof that night. No; he is not telling the truth.

Q. If he testified that you did have a page proof that night, he is not telling the truth?

A. That is right, sir.

Q. Now, the story "Reeve Raps Graft, Corruption" is a—do you care to look at it?

A. No. I can remember it.

Q. It is in general a story of a speech delivered by Bob Reeve at the Baranof Hotel at a Republican rally that night, is it not? A. Yes, sir.

Q. Delivered the evening of the 24th of September, 1952? A. Yes, sir.

Q. Do you know anything actually of your own knowledge about the writing of that story by Bob DeArmond?

A. I know that he wrote it; yes, sir.

Q. Do you know of your own knowledge, Mr. Daum, whether or not DeArmond had an advance

(Testimony of Jack D. Daum.)

copy of Reeve's speech? A. No, I don't.

Q. You don't know? A. No. [393]

Q. You don't know whether or not Mr. Reeve was in the habit, as many candidates are, of preparing copies for the press and distributing them prior to the speech? A. No, I don't.

Q. It is possible, is it not, that Mr. Reeve did give Mr. DeArmond an advance copy of his speech?

A. It is possible; yes, sir.

Q. That wouldn't be unusual?

A. It would not be unusual.

Q. Then it is possible that Mr. DeArmond might have written that story prior to the holding of the banquet? A. No, sir.

Q. It is not possible? A. No, sir.

Q. Why isn't it possible?

A. Because I know he came in that night to write it.

Q. What time did he come in?

A. It was rather late. It was after I had finished writing my other stories, and Bob came in; after I had finished and was ready to leave, he came in to write this story.

Q. Had he writen any portion of it at that time, or do you know?

A. I don't think—not to my knowledge, he hadn't.

Q. Is it possible that he had most of it written except for putting it in paragraphs? [394]

A. He could have had it written in his notes. I don't know.

(Testimony of Jack D. Daum.)

Q. Did you have that story on the evening of September 24, 1952?

A. I didn't; no, sir. The paper did.

Q. The paper did have it?

A. Bob had written it that night and left it on the desk; yes, sir.

Q. Did Beard have it that night?

A. I don't think so.

Q. Was it set into type that night?

A. No, I don't think it was, because the reason I quit was the—I mean, the reason I quit that night was because the linotype operators were through for the night, and I don't believe they were—in fact, I know they weren't working when Bob came to work.

Q. Well, then, if, again referring to Mr. Small, if he testified that that story was on a page proof that night, he is mistaken not only because it wasn't written but because there was no page proof? A. Yes, sir.

Q. I wonder if I could ask who employed you on the Empire, Mr. Daum?

A. Mrs. Monsen employed me.

Q. Mrs. Monsen employed you. I believe you testified on direct examination that you received no indoctrination [395] or instruction by Mrs. Monsen with regard to the editorial policy of the Empire? A. That is correct.

Q. May I ask you if you received any indoctrination or instruction by Jim Beard concerning the editorial policy of the Empire? A. No, sir.

(Testimony of Jack D. Daum.)

Q. None whatsoever? A. No, sir.

Q. No suggestion by Beard that the Empire did or did not have a certain attitude toward anyone or a certain policy toward anyone?

A. No. On the contrary, I had been in Alaska longer than Mr. Beard, and he realized that.

Q. Who was doing the work on the Empire prior to your going to work there about thirteen days before this article was written?

A. Who was working on the editorial desk, you mean?

Q. Yes. Who was handling this work that you took over; do you know?

A. I assume Mrs. Monsen and Mrs. Pegues, Johnny and Mr. Beard.

Q. Your particular job on the desk, was anyone handling that, that you know of, or do you know?

A. I don't know, as a matter of fact; no. Mrs. Monsen can [396] tell you.

Q. Now, during the period of time that you were employed by the Empire prior to September 25, 1952, had you written any previous editorials; had you written any editorials during that period?

A. Prior to 1952?

A. No. Prior to—any editorials for the Empire during the preceding thirteen days that you worked for the Empire, prior to the issue of September 25th?

A. I believe so. I would have to look back through the copies to make certain.

Q. You don't know whether you did or not?

(Testimony of Jack D. Daum.)

A. I believe I did.

Q. A few; many; regularly every day?

A. Well, it wouldn't be very many, sir, because I was only there thirteen days; but I am trying to recall any specific—this was National Newspaper Week. I think I had done an editorial on National Newspaper Week. I don't know. I would have to look back through the files, but I could tell you which ones I had written.

Q. Had you placed any editorials, if you did write any during that thirteen-day period, had you placed any of them on the front page of the Empire? A. I don't believe so.

Q. Placing this editorial on the front page of the Empire [397] was intended by you to indicate your feeling on the importance of the story, was it not? A. Yes, sir.

Q. Now, calling your attention to the issue of the Empire the following day, September 26th; there are two items pasted on this page; I will just address your attention to the smaller one at this time, a small box entitled, or a box entitled—the title is "Attention." Do you know who wrote that item? A. Yes, sir. I wrote that.

Q. You wrote that. And that appeared, that item marked "Attention" there, appeared on the front page of the Daily Alaska Empire, for September 26, 1952, did it not? A. Yes, sir.

Q. Were you responsible for placing it on the front page, Mr. Daum? A. Yes, sir.

Q. You made up the front page on the 26th as well as on the 25th? A. Yes, sir.

(Testimony of Jack D. Daum.)

Q. Did you have any discussions with anyone prior to writing and publishing the item labeled "Attention" on September 26, 1952?

A. Yes, sir; I had discussions.

Q. Would you state who you had such discussions with? [398]

A. Well, Mrs. Monsen, for one.

Q. Any other persons, to your recollection?

A. I believe Elmer Friend had dropped in at that time.

Q. Was he then employed by the Empire?

A. No; he wasn't. He had been.

Q. Just anyone else, if you can recall?

A. Well, I don't recall the other names, as to who I talked to about it.

Q. As to the other item on this sheet, it is an editorial in rather bold-faced type appearing on October 6, 1952, I believe on the front page of the Alaska Daily Empire. Were you employed by the Empire on that day? A. Yes, sir.

Q. Do you know who wrote that editorial?

A. Yes, sir.

Q. Will you state who it was? A. I did.

Q. You wrote that editorial? A. Yes, sir.

Q. And did you also place it on the front page of the Daily Alaska Empire? A. Yes, sir.

Mr. Faulkner: What date is that?

Mr. Kay: October 6, 1952. "An Editorial. Intimidated?" [399]

Mr. Faulkner: Are you going to introduce them?

(Testimony of Jack D. Daum.)

Mr. Kay: Yes; now that he has identified both of them as having been written by him and placed on the front page of the Empire. This is October 6th, and the other he has identified already. There being no objection, Your Honor, I will offer them in evidence.

Mr. Faulkner: One of September 26th and the other——

Mr. Kay: And the other of October 6th.

Mr. Faulkner: Are you offering them both together?

Mr. Kay: I was just going to leave them together, if that is all right.

Mr. Faulkner: It is all right; yes. I wanted to get the numbers straight.

The Court: There being no objection, the two editorials may be admitted in evidence.

Mr. Faulkner: That will be No. 11, will it?

The Clerk: Yes.

Mr. Kay: Ladies and gentlemen, I will read this item entitled "Attention," because it is short and should be brought to your attention at this time. The item appeared on the front page of the Empire in a box, a black box, as you can see here, entitled "Attention: Our attention has been called to a paragraph in yesterday's lead story about the Chilkoot Ferry bank account. A parallel was drawn between this case and that of a former Territorial official now confined [400] to a federal prison.

"It was not our intention to infer that there has been any misappropriation or theft of these funds,

(Testimony of Jack D. Daum.)

but merely that in both cases, checks were drawn against Territorial funds in bank accounts without being offered for the scrutiny of the Office of the Auditor as provided for by the law.

"The Empire regrets any misunderstanding that may have arisen from this paragraph and hastens to repeat that there has been no evidence of any fraudulent or personal use of any of the funds in the special account."

Q. (By Mr. Kay): And that was written by you and published on the front page of the Empire on the following day; is that correct?

A. Yes, sir.

Q. Had it been called to your attention prior to your publication in the writing and publishing of that item that persons had interpreted your article of the previous day as implying that there had been a theft or embezzlement of public funds?

A. Prior to publication?

Q. No. After your publication of the previous day and prior to this publication, had it been called to your attention by anyone that persons did interpret your article of September 25th as inferring that there had been a theft or misappropriation of public funds? [401]

A. No, sir; not that they did; just that they may have; that there was a possibility of the misinterpreting that one paragraph.

Q. That applies only to that one paragraph of the article?

A. Well, to the article. The idea was that some-

(Testimony of Jack D. Daum.)

body might misinterpret the article to get the idea that we were accusing the Governor, the Treasurer and the Highway Engineer of theft or misappropriation of their funds. No such intention was meant.

Q. Now, I want to get this very clear. The first paragraph reads, Mr. Daum: "Our attention has been called to a paragraph in yesterday's lead story about the Chilkoot Ferry bank account. A parallel was drawn between this case and that of a former Territorial official now confined to a federal prison." And that is the paragraph concerning which that item was published, is it not?

A. Yes, sir.

Q. That paragraph being the one in the lead story written by you: "The case closely parallels that of Oscar Olson, former Territorial Treasurer who is now serving a prison term at McNeil's Island Penitentiary for violating the law in the receipt and disbursement of public funds."

A. Yes, sir.

Q. Now, I believe you testified, did you not, on direct examination, Mr. Daum, that your use of that parallel [402] was based upon a discussion of the law which you had with Auditor Neil Moore; is that correct? A. Yes, sir.

Q. May I ask if—and in your article you cited a number of sections of the Territorial law. I will show you those references, Mr. Daum. I don't believe there were any prior to this. There is one ref-

(Testimony of Jack D. Daum.)

erence here—"the written opinion that, under Section 12-2-1, ACLA 1949, it is mandatory that the money be placed in the general fund." Then a reference to the '51 Reorganization Act—another citation. Then follows the letter of Neil Moore and his reference, embodied by you in your story, referring to Section 11-3-8, ACLA 1949, Section 12-2-1, ACLA 1949, and Section 12-3-1, ACLA 1949. Now, are those the—is that the law that you discussed with Mr. Moore, Mr. Daum?

A. That and the other section—sixty-five-dash-something-or-other, under—the section under which Mr. Olson had been sentenced.

Q. That would be——

Mr. Kay: Might I have Volume III please, Your Honor?

Q. (By Mr. Kay): That is the section of the Territorial law on embezzlement, is it, Mr. Daum? I will show it to you.

A. I am no attorney, Mr. Kay. [403]

Mr. Faulkner: 65-3——

Mr. Kay: Isn't it 63?

Q. (By Mr. Kay): May I ask you, while I am looking this up, Mr. Daum, if you and Mr. Moore actually went over these particular sections?

A. Just the one. He pointed out to me the section under which Mr. Olson was sentenced and said it is the same thing; there is no difference; you can draw a parallel here; anybody can see the parallel.

Q. 65-5-63; is that it? If you recall, Mr. Daum,

(Testimony of Jack D. Daum.)

will you state whether this is the section which Mr. Moore showed to you and went over?

A. I believe so. If it says that—yes, sir; that is it.

Q. That is the section that Mr. Moore showed you and which you discussed with him; is that right? A. Yes, sir; quite certain.

Q. Let the record show that the—of course you are reasonably sure that is it? A. Yes, sir.

Q. ——that the witness has referred to Section 65-5-63. "Embezzlement of public money."

Well, Mr. Daum, did you ever check the actual record or the judgment and sentence of execution of Oscar Olson? A. No, sir; I didn't. [404]

Q. Prior to publishing this story, or at any time?

A. No, sir. I took Mr. Moore's word for it. In fact I was reporting what Mr. Moore said. I was printing his beliefs, although I believed it myself also.

Q. It would then come as a surprise to you if you examined this certified copy of the Judgment and Commitment of Oscar G. Olson, done in open court on the 3rd day of January, 1950, to find that Mr. Olson had been convicted under Section 7-1-9, ACLA 1949? A. I believe——

Mr. Faulkner: Just a minute. I object to that question, Your Honor. The witness has testified as to the section under which Mr. Olson was sentenced, not convicted, sentenced.

(Testimony of Jack D. Daum.)

Mr. Kay: The section under which he was sentenced?

The Court: He did testify——

Mr. Faulkner: He was convicted under another section, and sentenced under this section—65-5-63. We have made that distinction all the time.

The Court: How could it be possible that a person convicted of crime could enter a plea under one section and be sentenced under another section?

Mr. Faulker: Well, if Your Honor will read the section that he violated, it provides that the punishment be under the other section. [405]

Mr. Kay: In other words, it merely says it shall be punished as embezzlement.

Mr. Faulkner: Yes.

The Court: I haven't seen this exhibit.

Mr. Kay: The exhibit does show——

Mr. Faulkner: It shows the section violated.

Mr. Kay: ——in violation of Section 7-1-9, ACLA 1949.

Mr. Faulkner: If the Court wants to look at it, it will see that the punishment is provided under another section.

The Court: Just a moment. May I look at it? "Embezzlement of public money."

Mr. Kay: Yes, Your Honor. The only point, Your Honor, that we are considering here is Mr. Faulkner's objection to my question, which I think is a perfectly proper one, merely asking the witness to examine the Judgment and Sentence and state the section under which Mr. Olson was convicted.

(Testimony of Jack D. Daum.)

The Court: Well, but what happened here is that the witness has testified, as I understood him, that he was informed by Mr. Moore that this Section 65-5-63 is the statute under which Olson was convicted.

Mr. Faulkner: No. Sentenced, your Honor.

The Court: I thought he said convicted. Then I had it wrong.

Mr. Kay: Well, we will check the record on that. I am of the same impression as your Honor. [406]

The Court: Well, 65-5-63 provides no sentence —yes, it does.

Mr. Faulkner: The other one doesn't.

Mr. Kay: Well, in other words, the——

The Court: 65-5-63 provides the punishment for embezzlement.

Mr. Kay: It refers only to the punishment section of it; that is all.

Mr. Faulkner: Yes. That is what he was talking about.

Mr. Kay: Well, in other words, Olson was convicted under 7-1-9. That is the statute he violated. He didn't violate the punishment section of 65-5-63. He was sentenced under it. He was punished.

Q. (By Mr. Kay): Mr. Daum——

Mr. Kay: I am sorry.

The Court: Under the Section 7-1-9 there provides no punishment, but under Section 65-5-63 there does, so that the statement of the witness, if he so stated, that Section 65-5-63 is the one under

(Testimony of Jack D. Daum.)

which he was sentenced, the Court was in error, and that is the Court's ruling.

Q. (By Mr. Kay): Is that your testimony now, Mr. Daum? A. It is now, and it was then.

Q. And this—then it is that you and Mr. Moore were discussing only Section 65-5-63; is that right? [407] A. Yes, sir.

Q. You did not discuss Section 7-1-9?

A. As a matter of fact, we didn't discuss it. He pointed this out to me, where the parallel was between them.

Q. In 65-5-63? A. Yes, sir.

Q. Well, now, the only reference in the Olson case to 65-5-63 was with regard to the sentence to be imposed?

A. Well, I don't know that, Mr. Kay. I mean, I am no lawyer. He just pointed it out.

Q. If that be true, Mr. Daum, are we to assume that you and Mr. Moore were discussing what sentence would likely be imposed on the Governor——

A. No, sir.

Q. ——and the Treasurer——

A. No, sir.

Q. ——and the Highway Commissioner?

A. No, Mr. Kay. We were discussing the parallel between the cases.

Q. The parallel between the cases; but the only parallel, the only reference as to this section, in the case of Oscar Olson is to the punishment for embezzlement, the imprisonment. It has nothing whatever to do with this case.

(Testimony of Jack D. Daum.)

A. I was not aware at the time and up until now I haven't [408] been aware that there was any other section involved in this case. Mr. Moore pointed this section out and said that is the same one that Oscar Olson violated and the one under which he was sentenced, and there is the parallel right there.

Q. Well, in view of the Judgment and Sentence it is obvious, is it not, that Mr. Moore was mistaken as to the section under which Mr. Olson had been convicted—had been convicted? I am not trying to confuse you.

A. I never said that he was, and I don't believe Mr. Moore ever told me that he was convicted under that, although he pointed out the parallel in this statute, and that is the basis on which I reported that he said there was a parallel, that and the fact that the funds were handled the same way.

Q. Now, so——

Mr. Kay: Let me see that Section 65.

Q. (By Mr. Kay): Did Mr. Moore point out to you the provision, in your discussion did Mr. Moore discuss the provision of 65-5-63 that he felt Mr. Olson had violated?

A. That Mr. Olson had violated?

Q. Yes.

A. No, sir. He just pointed out——

Q. Well, did he discuss the section that he felt Mr.—that the Highway Board had violated, the provision of it? [409]

(Testimony of Jack D. Daum.)

A. Yes. He pointed out this section. He said the same section holds.

Q. Point out which portion of the section that he referred to when he was discussing this law with you?

A. Well, as I remember—Mr. Kay, this was three years ago, and to take a section apart three years after it was pointed out to me—but, as I recall, the parts that he pointed out was——

Q. Take your time and read it.

A. Yes. "That if any person shall receive any money whatever for said Territory or for any county, town, or other municipal or public corporation therein, or shall have in his possession any money whatever belonging to such Territory, county, town, or corporation, or in which said Territory, county, town, or corporation has an interest, and shall in any way convert to his own use any portion thereof or shall loan, with or without interest, any portion thereof, or shall neglect or refuse to pay over any portion thereof as by law directed and required"—that is the section, that is the part of it, that the loaning of the money and the "neglect or refuse to pay over any portion thereof as by law directed and required."

Q. Mr. Moore pointed out this to you, did he, that in his opinion the law had been violated in this instance by [410] lending the money?

A. He pointed out the loan and the neglect to pay over as required and then showed me the stat-

(Testimony of Jack D. Daum.)

ute on the 12-2-1 that provides that the money should go into the general fund.

Q. Now, that is the manner in which Mr. Moore and you determined that Section 65-5-63 had been violated; is that correct?

A. That is where we drew the parallel from.

Q. The parallel. Well, now, in the Oscar Olson case was Mr. Olson convicted for loaning any Territorial money?

A. Sir, I don't know. I don't know. I am not familiar with the details of the case.

Q. You don't know? Weren't you in the Territory when Oscar Olson was convicted?

A. What year was that?

Q. 1950.

A. Yes, sir; I was in Fairbanks.

Q. You were working for the Fairbanks News Miner, were you not? A. Yes, sir.

Q. You reported the case of Oscar Olson rather fully, did you not?

A. No, sir. That was an Associated Press story.

Q. Well, you read it, didn't you? [411]

A. I imagine I did; yes, sir.

Q. Well, you, as a matter of fact, know of your own knowledge that Oscar Olson was convicted of converting the money to his own use, pocketing it, making away with it?

Mr. Faulkner: Just a minute. I think counsel is going a little astray here. The judgment in that case speaks for itself——

(Testimony of Jack D. Daum.)

The Court: The judgment doesn't recite the——

Mr. Faulkner: ——whether he stole any money or converted it to his own use.

Mr. Kay: I am asking if he didn't know that.

The Court: I think the question is quite proper, as to whether the witness knew that or not.

Mr. Kay: Certainly.

The Court: The objection is overruled.

Q. (By Mr. Kay): Did you know that?

A. What?

Q. That he was convicted of stealing and pocketing Territorial money and converting it to his own use?

Mr. Faulkner: Just a minute. I must renew my objection. Now he is asking the witness if he knew something that isn't in the judgment. The judgment is the best evidence of those things and it was introduced here.

The Court: The Court will take judicial notice of the fact, counsel, that the judgment and sentence in a [412] criminal case does not recite the whole language of the offense charged but only the title of the offense charged, which is done in this exhibit. Therefore, the question is proper as to what this defendant knew at the time of writing this article.

Mr. Faulkner: That he knew something that isn't so according to the judgment? It doesn't appear there.

The Court: The objection is overruled.

Q. (By Mr. Kay): You may answer the question, Mr. Daum.

(Testimony of Jack D. Daum.)

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The Court: The objection is overruled.

Q. (By Mr. Kay): You may answer the question, Mr. Daum.

(Testimony of Jack D. Daum.)

A. Whether or not I knew that Mr. Olson had stolen money from the Treasury?

Q. Yes, sir. A. Yes, sir.

Q. You knew that, didn't you?

A. Yes, sir.

Q. When you drew this parallel, you knew that?

A. Sir?

Q. When you drew this parallel on September 25, 1952, you knew that?

A. I knew that he had stole the money; yes, sir.

Q. Now, you have stated that you wrote the editorial appearing on the front page, Mr. Daum, "Start Talking, Boys"? A. Yes, sir.

Q. May I ask if you had any communication with Oscar Olson prior to writing that story, that editorial? [413] A. With Mr. Olson?

Q. Oscar Olson—Oscar G. Olson?

A. No, sir.

Q. In the last paragraph of your editorial you state: "Oscar Olson sits today in his prison cell, dreaming of the days when he thought territorial laws were only for the underlings." That was perhaps your editorial license as to what you thought Mr. Olson might be thinking; is that right?

A. That was a fair assumption; yes, sir.

Q. You didn't; you had no direct knowledge of what Mr. Olson might be thinking at that time, had you? A. No, sir.

Q. Your intention in writing that paragraph was to compare Oscar Olson to Gruening, Roden and Metcalf in that respect, was it not, Mr. Daum?

(Testimony of Jack D. Daum.)

A. No, sir.

Q. Was it not your intention, sir, when you—the immediately preceding paragraph reads as follows—and the whole editorial is devoted to this Chilkoot Ferry fund—— A. Yes, sir.

Q. ——and to the part played in the Chilkoot Ferry fund by Gruening, Roden and Metcalf?

A. Yes, sir.

Q. And, in fact, the preceding paragraph reads as follows: [414] "But this is a case where Gruening, Roden and Metcalf will have to stand on their own feet and explain to Alaskans whether the territorial law is applicable to some and not to others or whether they acted in complete defiance to the law in the belief they would not be caught."

A. Yes, sir.

Q. "Oscar Olson sits today in his prison cell, dreaming of the days when he thought territorial laws were only for the underlings."

A. Yes, sir.

Q. Now, do you state that it was not your intention to relate Oscar Olson, thinking that Territorial laws were only for the underlings, to Gruening, Roden and Metcalf in that respect?

A. Not to them as persons; no, sir.

Q. Well, to them as what?

A. To the idea involved. The story itself relates the persons and the dates and the events. The editorial tries to point out the ideas and principles that are explicit in this story, the fact that here are public officials—I don't care who they are—public

(Testimony of Jack D. Daum.)

officials disregarding the normal methods of handling money in the way the law provides and failing to account to the public for the way that money is being handled. Oscar Olson is [415] a good example of that principle of public officials forgetting their duty towards the public and forgetting the fact that they have to account to that public for every penny of Government money that is in their hands.

Q. Well, then, the point was that you considered, as I gathered from your explanation there, that you considered, and intended for the reader to understand from that, that Gruening, Roden and Metcalf, as Oscar Olson, thought Territorial laws were only for the underlings; is there any other interpretation that can be drawn from it?

A. Their actions in this case.

Q. Were comparable to those of Oscar Olson?

A. No, sir. Let me say it, sir. Their actions in this case pointed up once again that the public must ever be alert to public officials who feel that they can conduct their office to please themselves without bothering with all the red tape that has been set up by society to protect that money.

Q. Well, is it your impression that Oscar Olson was convicted for disregarding red tape?

A. Red tape; considerable red tape; yes, sir.

Q. Oscar Olson was, as you have admitted, convicted of a theft of public funds, was he not?

A. Through misuse of his office. [416]

Q. The theft of public funds by misuse of his office?

(Testimony of Jack D. Daum.)

A. Yes, sir. If the misuse was—if he had not misused his office or abused the rights that the public had given him, the theft would not have occurred. The principle comes before the act.

Q. I believe you testified, did you not, that the use of the word "Private" in your subheadline here "Diverting Cash to Private Bank Account"—I missed your explanation of what you meant by the use of the word "Private" in that respect.

A. Private as opposed to public, a public bank account being the Treasury.

Q. I see. Well, you realize that all the funds of the Territory are kept in bank accounts throughout the Territory, do you not?

A. Yes, sir; but under the Treasurer.

Q. The Treasurer was a member of the Board of Road Commissioners in this case, was he not?

A. Acting as a member of the Board of Road Commissioners; yes, sir.

Q. True. And this was—the money was in a bank in the same sense and in the same manner as the rest of the Territorial funds, the funds of the Territory, was it not? A. No, sir. [417]

Q. In your interpretation?

A. No, sir. The rest of the money had been turned into the general fund and had gone through the Treasurer's Office and had been accounted for.

Q. But money that is in the general fund is actually on deposit in banks, is it not? We don't have a vault for the Treasury, do we?

A. I don't know, Mr. Kay. I realize that some Territorial monies are kept in banks; yes, sir.

(Testimony of Jack D. Daum.)

Q. Isn't all money in the general fund or substantially all the money in the general fund kept in banks; or do you know, sir?

A. I don't know, sir.

Q. Now, in your—just one more item, Mr. Daum—I have in my notes that you testified on direct examination that there was nothing particularly unusual about the size of headline?

A. No, sir. We have both larger type and smaller type.

Q. Can you recall—how long were you with the Empire, Mr. Daum? A. Altogether?

Q. Well, I know you came there in—September?

A. From the time I came there in September—September, October, November, December, January, February, March, April—I believe I left in May—nine months. [418]

Q. During that time can you recall any other story in which you used as large or larger type?

A. Yes, sir.

Q. Name one.

A. Well, there was the Presidential election shortly after this that we used larger type.

Q. Larger type?

A. I believe so. I am not certain but I think the Empire used larger type on the sinking of the "Kathleen" shortly before this.

Q. You were not there on the sinking of the "Kathleen"?

A. I arrived the day after the sinking. The

(Testimony of Jack D. Daum.)

story appeared the day I arrived. I can't recall any other specific stories, but I know we had larger type.

Q. How about the Yankees winning the world series? You didn't use nearly as large type on that, did you?

A. Just about the same. It appears to be about two or three points more. I think one is 96 point and the other 104. I am not certain. Just about the same size. About six points smaller.

Q. Well, then, I take it that you consider in your opinion, that is the opinion of you as setting the policy of the Empire on this day, that the stories and editorials on the special ferry fund were a larger and more important news story than the Yankees winning the world series? [419]

A. Yes, sir; in that they dealt with a more important principle than the principle of baseball.

Q. You testified that you believe that you used larger type on the Presidential election?

A. I believe so.

Q. Now, as a matter of fact, Mr. Daum, are you sure that the Empire has any larger type?

A. Yes, I am positive we have larger type. I am sure you will find larger type in that same paper, display type.

Q. Larger type? A. Larger type; yes, sir.

Q. Than that, than the headline in that paper?

A. I believe so.

Q. I would be very appreciative if you could

(Testimony of Jack D. Daum.)

find me an example of it at any time, Mr. Daum, at your convenience.

Mr. Kay: I have no further questions.

Redirect Examination

By Mr. Faulkner:

Q. Now, Mr. Daum, just one or two questions. On the issue of the Empire of September 26th, a portion of which counsel has introduced here in evidence, I will hand you the whole front page of the paper of that day and ask if you are familiar with that? A. Yes, sir. [420]

Q. And are you familiar with the article there attributed to Mr. Roden? A. Yes, sir.

Q. In large type? A. Yes, sir.

Q. Do you know whether that is correct? This quotes Mr. Roden. Did you write that?

A. I wrote that story; yes, sir.

Mr. Faulkner: We will offer this in evidence, this whole front page in evidence.

Mr. Kay: I wonder if we can just glance through it for a moment here?

Mr. Faulkner: Yes, I don't know what else——

Mr. Kay: No objection.

Mr. Faulkner: We will offer this in evidence. Does the Court want to see it?

The Court: No. It may be admitted.

Mr. Faulkner: That will be——

The Clerk: M.

(Testimony of Jack D. Daum.)

Mr. Faulkner: ——defendant's Exhibit M.

The Court: I did not quite get what it is.

Mr. Faulkner: He said it was an interview with Mr. Roden or a statement by Mr. Roden.

The Court: The same as referred to in the Independent, or another one? [421]

Mr. Kay: Your Honor, I introduced just a clipping from the paper, two clippings from the paper.

Mr. Faulkner: From this front page; and I want all of the front page.

Mr. Kay: This is the full front page, and it shows the position and everything else.

The Court: Well what I wasn't clear on was, is this supposed to be the same interview?

Mr. Faulkner: I don't know whether it is the same or not. I don't think it is quite the same.

Mr. Kay: The next day's story anyway.

Mr. Faulkner: This one was written two weeks before the other one was.

Q. (By Mr. Faulkner): Mr. Daum, you say that that is correct, this story in the issue of the Empire of September 26, 1952? A. Yes, sir.

Q. And you had quite prominent headlines on that? A. Yes, sir. I played it high.

Mr. Faulkner: That has been introduced now. I will show it to the jury.

Mr. Nesbett: What exhibit is that?

Mr. Faulkner: Exhibit M.

Q. (By Mr. Faulkner): Mr. Daum, at the time you wrote these articles did you know—don't go into the extent—but did [422] you know that the ferry fund was short?

(Testimony of Jack D. Daum.)

Mr. Kay: I object to that as assuming a fact not in issue.

Mr. Faulkner: It is in issue I think. It has a bearing on the story, certainly.

The Court: The objection is overruled. It doesn't assume a fact. He is asked whether he knows That is material.

Mr. Kay: He assumed that to be a fact.

The Court: I think not, counsel. The objection is overruled.

Q. (By Mr. Faulkner): Do you know whether the ferry fund was short?

A. I didn't know; no, sir. There had been, well, rumors, suspicions and beliefs that something was wrong with this ferry fund and with a little investigation by the U. S. Attorney it would turn up either shortages or errors in the fund.

Q. Now, a complaint was made as to the reference there in this article to the District Attorney. Was that the reason you referred to the District Attorney in the article?

A. Yes, sir. I had called him and asked him if he was going to investigate this ferry fund, and he said that he didn't know at that time, I believe, and I asked him, [423] "If you don't take action, who else would?" And he said, "I am the only one that would take action because I am the only—I am the one who prosecutes Federal and Territorial Treasurers."

Q. Well, don't repeat the conversation. That is the reason you referred to him in the article?

(Testimony of Jack D. Daum.)

A. Yes, sir.

Q. Now, Mr. Daum, you referred this morning to the policies of the four papers—I think you referred to them, didn't you, as the Ketchikan News, the Juneau Empire and the Fairbanks News Miner; and what was the other one?

A. Anchorage Daily News.

Q. Anchorage Daily News—with reference to public affairs generally, I think. What did you mean by that? Mr. Kay asked you some questions about it.

Q. Mr. Kay asked me if the policy of those papers weren't the same, and I assured him that the policies were the same, and Mr. Kay attempted to have me say, or, rather, asked me whether or not they were the same in relation to opposing Mr. Gruening and his administration.

Q. Now, what did you mean by those policies being the same?

A. Our policies were the same in that each one of those papers was not afraid to publish any criticism of the administration for fear of reprisal, and we took every opportunity—— [424]

Mr. Kay: I object to that, your Honor, and move that it be stricken. There is nothing in evidence that would justify that at all. The witness is being invited to make a self-serving declaration of some kind here which, I think, is entirely irrelevant.

The Court: He was asked concerning the policy of the paper. He certainly may state his view of

(Testimony of Jack D. Daum.)

the policy of the paper. I can't find that it is self-serving.

A. Well, what I am trying to say is that our policy was not against Mr. Gruening. The policy was to watch closely the acts of the public officials, no matter who was in or of what political hue, and to publish the facts concerning their acts in office, especially when those acts were contrary to the public interest. I might add that those newspapers which took that view suffered considerably by lack of receiving Territorial contracts and printing and advertising and in the shortage of news from the Territorial capital.

Q. Now, Mr. Daum, Mr. Kay asked you also about editorializing in the news. You said Mrs. Monsen had called your attention to one case where you had editorialized. Now, what do you mean by editorializing in the news?

A. Well, in that one instance I meant placing the quotation marks around the words "road inspection trip" for the purposes of showing that, well, the editorializing does [425] not necessarily mean that you are injecting your own thoughts into the article but rather you are showing the whole truth of the matter, so that to place the road inspection as being Mr. Gruening's explanation of his trip, and adding that it is the eve of the Territorial elections without commenting on it, and let the public judge for themselves whether there is any connection.

(Testimony of Jack D. Daum.)

Q. Yes. Well, were you on the Empire, working for the Empire, in November, 1952?

A. Yes, sir.

Q. Do you recall the strike, that steamship strike, that was in that month, that tied up the steamers for three or four weeks? A. Yes, sir.

Q. Do you recall various news items there, over the course of a few days, stating that certain head officials of the Territory were absent from the Territory at that time?

A. Yes, sir; at one time we had four or five—yes, sir; I do recall that.

Q. And maybe I can refresh your memory, if it is permissible. The Governor was away, was he?

A. Yes.

Mr. Kay: I object.

Mr. Faulkner: I will withdraw that question.

The Court: I cannot see—well, you have withdrawn the question.

Q. (By Mr. Faulkner): Now, do you know what happened there in the absence of these officials with reference to the strike? A. Yes, sir.

Mr. Kay: Is this relevant? I object again.

The Court: Again, I see no relevancy.

Mr. Faulkner: He talked about editorializing, and I want to bring out just what editorializing is in the news and what the duty of a newspaper is. I think the jury is entitled to know.

The Court: I think he has explained that.

Mr. Faulkner: Well, I don't think he explained it as well as he can.

(Testimony of Jack D. Daum.)

The Court: Well, is it necessary, counsel, to go into the details? Cannot that be explained in general terms as he has done?

Mr. Faulkner: Just one instance, your Honor, and I want to show——

The Court: If you wish to show an illustration of what he calls editorializing, you may do so.

Mr. Faulkner: I want to show an instance, yes; it isn't an instance; it is an illustration based on facts.

The Court: Very well. [427]

Mr. Faulkner: All right.

Q. (By Mr. Faulkner): Now, Mr. Daum, you know what happened there; I mean, with reference to this strike? A. Yes, sir.

Q. What was it?

A. Well, the officials in the Territory—the Governor, the Attorney General, the Highway Engineer, the Treasurer—I don't know whether the Treasurer was absent or not—but at any rate they were all absent from the Territory during this strike, and there was nobody, the Governor nor the Attorney General, to take action against, or to take positive action in getting this strike stopped and getting the flow of supplies coming to Alaska, so the Chamber of Commerce in Juneau took it upon itself to hire an attorney to go to Seattle and attempt to obtain an injunction against the strikers.

Mr. Roden: That is not true.

Q. (By Mr. Faulkner): Now, referring to that, Mr. Daum, is that the type of matter that you think

(Testimony of Jack D. Daum.)

the paper should editorialize on when they publish this news?

A. I believe that would have been a very likely case for a paper to editorialize and point out where the fault lay in the Territory not being able to take any action.

Q. Isn't that—that is a duty of a paper, isn't it?

A. I would say so; yes. [428]

Mr. Faulkner: I think that is all, Mr. Daum.

Recross-Examination

By Mr. Kay:

Q. Well, Mr. Daum, would you say that that would be, this example Mr. Faulkner has given you, would be a fit place for editorializing in the news columns? Is that what you meant to imply?

A. It would have been an example of what I was trying to say. To merely say that a strike is on and that the Chamber of Commerce is taking action, isn't telling the entire news, and yet it could be construed as editorializing to say the strike is on and there are no Territorial officials here to take action and the Chamber is taking action.

Q. Well, as long as—it would be in fact editorializing? A. Yes, it would be.

Q. In the news column? A. Yes, sir.

Q. There might be a difference of opinion on that. Is it a matter of fact that officials were absent or that all officials were absent who could have taken action?

(Testimony of Jack D. Daum.)

A. Well, the Governor and the Attorney General were absent.

Q. Wasn't the Secretary of Alaska the Acting Governor?

A. I don't recall whether he was present or not. [429]

Q. Well, now, is it your testimony that the Secretary of Alaska was absent from Alaska at the same time the Governor was, at that time?

A. That is not my testimony; no, sir.

Q. It is not a fact, is it?

A. I don't know, sir.

Q. Treasurer Roden is the man who went down to settle that strike, isn't he?

A. I believe Mr. Roden is the man that the Chamber sent down; yes, sir.

Mr. Roden: By the Territory.

Q. (By Mr. Kay): Did he go as a Chamber delegate, or did he go on behalf of the Territory?

A. I don't know. Mr. Roden just said he went on behalf of the Territory. I will take his word for it.

Q. You said in response to a question of Mr. Faulkner's that, although you had no knowledge of whether or not there was any shortage in this particular fund, that there were rumors and suspicions about it at the time. Does that mean that there was such rumor and suspicion before September 25, 1952, at the time you wrote this story and editorial?

(Testimony of Jack D. Dann.)

A. No, sir. Did you say that there were rumors or suspicions or such?

Q. Prior to September 25, 1952? [430]

A. Well, what I meant was that Mr. Moore told me that there would probably be more come out of this than—he wanted to audit the fund, and I asked him why he didn't just go over and audit it, and he said, "Up until now I haven't even officially known that it was there, but once that fund is audited you can bet that there is probably going to be more come to light than at present."

Q. In other words, Moore was sure of the fact that he would uncover something when he audited it? A. Not certain; no, sir.

Q. But "be sure," isn't that the words you used?

A. There was a suspicion there.

Q. You say that Mr. Moore told you he hadn't known anything about the fund before that?

A. He said he had not been officially apprised of it; he did not officially know of it.

Q. And he said that that was his reason for not having audited it?

A. I believe that is about right.

Q. So that, if Mr. Metcalf testified that he asked Mr. Moore within a few days after the meeting of June 5, 1952, to assist in setting up books for this fund, and that he twice requested audits from Moore of the fund, Moore would have been mistaken; either Moore or Metcalf would have been mistaken about that? [431]

A. I wouldn't say that; no, sir. I don't know.

(Testimony of Jack D. Daum.)

Q. If that is true, it wouldn't reconcile with what Moore told you or gave you to understand at that time?

A. Mr. Kay, I don't recall Mr. Moore's exact words enough to contradict Mr. Metcalf, or either way on that.

Q. Did any other rumor or suspicion come to your attention prior to the publication of these articles on September 25th? A. No, sir.

Q. Other than Mr. Moore's?

A. Except from Mr. Homer, when he said that chances are—he said to be sure and—something about "You want to check into this ferry deal. There is a lot going to—that is going to break wide open" or some such thing.

Q. Was that after Mr. Homer had been discharged?

A. I don't know. It was about a week or ten days before the article was written.

Mr. Kay: That is all.

Mr. Faulkner: That is all, Mr. Daum.

The Court: We will take a recess at this time for five minutes.

Mr. Faulkner: Oh, pardon me, your Honor. We are finished with Mr. Daum, and I wonder if counsel objects to his remaining here. Everybody else seems to be here on the other side. [432]

The Court: If he is not to be recalled.

Mr. Kay: If he is not to be recalled, I have no objection at all.

Mr. Faulkner: Well, I have nothing in mind now. I don't know what might transpire.

The Court: Well, the rule of exclusion of the witnesses may now be waived as to Mr. Daum.

Mr. Faulkner: Unless something comes up—I don't believe there will be.

(Witness excused.)

(Whereupon, Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; whereupon the trial proceeded as follows:)

Mr. Faulkner: If the Court please, our next witness will be Mrs. Monsen, and the plaintiffs took Mrs. Monsen's deposition in Juneau, and it will be quite a strain for her to be on the stand and go all through this again, and I have cross-examined her very little in that deposition, but I would like to read the deposition and I think that will shorten the time and get in most of her evidence.

The Court: I believe the rules do not permit the deposition to be used unless the witness is not within one hundred miles of the place of trial. Now, unless counsel wish to waive that, that is the way I understand it. [433]

Mr. Faulkner: Do you mind if I read these questions and answers?

Mr. Nesbett: No. Your Honor, I told Mr. Faulkner when we took it that it could be read, although he assured me she would be here and would take the stand.

Mr. Faulkner: She will. She will take the stand, but we agreed that this could be read by either party, but, as I say, it is unusual for the Court to have the witness here and read a deposition at the same time, but, these questions, I don't want to have to go over the same ones again, unless counsel does, and——

Mr. Kay: It being understood that we are not limited on our cross-examination?

Mr. Faulkner: Oh, no.

Mr. Kay: All right.

Mr. Faulkner: No, not at all.

The Court: Very well. Then it is understood that the rule which we just referred to is waived, except that Mrs. Monsen may be called for further examination.

Mr. Faulkner: Yes. We agreed to that when we took the deposition.

The Court: Very well.

Mr. Faulkner: I will read the questions and answers.

(Whereupon, the deposition of Helen Monsen was read as follows by Mr. Faulkner:) [434]

Mr. Faulkner: This deposition is taken, it says here, pursuant to stipulation, so that is all right.

(Reading.)

Proceedings

Mr. Nesbett: The deposition of Mrs. Helen Monsen is being taken in connection with all three of

the consolidated actions pursuant to stipulation of counsel representing the plaintiffs and of counsel representing the defendant for the purpose of this deposition only.

Mr. Faulkner: All right.

MRS. HELEN MONSEN

being first duly sworn upon oath, deposes as follows:

By Mr. Nesbett:

Q. Mrs. Monsen, you were the President of the Empire Printing Company on September 24, 1952, were you not? A. Yes.

Q. And you still are the President of that corporation, in the process of being dissolved?

A. Yes.

Q. And on September 24, 1952, did you hold an official position in the printing company?

A. Yes.

Q. Were you actively engaged in the activities of the printing company and in the printing of the Daily Alaska [435] Empire? A. Yes.

Q. Now, how long prior to September 24, 1952, had you supervised the activities of the printing corporation?

A. That I have to think about. I presume that would go back to 1938. There is a period when I was away from Juneau, but it was always under my supervison. The work was carried on by the staff.

Q. In your capacity as President, Mrs. Monsen,

(Deposition of Mrs. Helen Monsen.)

you hired and discharged, if necessary, your editors, did you not? A. I did, yes, I presume.

Q. On September 24, 1952, did you have employed on the Daily Alaska Empire a man named Beard? A. Yes.

Q. And what was his position with the Empire Printing Company?

A. I don't know what it was at that time. He had been Business Manager; he had been Manager; he had been Editor and Manager, and I don't know what it was at that time. If you want me to look it up——

Q. No, that won't be necessary. Is it a fact that as of that time, September 24, 1952, Mr. Beard did have an executive position with your paper, did he not? A. Yes, I think so.

Q. Is it true that under your supervision he supervised the [436] make-up and printing of the Daily Alaska Empire?

A. I don't know whether he was on the desk then or whether Jack Daum did it. I could find out.

Q. He was, however, engaged in——

A. He worked in both the front office and the business office and in a small town daily, one just goes ahead and does what has to be done every day.

Q. Would you say then that Mr. Beard on that date had considerable authority nevertheless, in an executive capacity? A. Yes.

Q. Did you on that date, September 24, 1952, have a Mr. Daum, D-a-u-m, working for you?

A. Yes.

(Deposition of Mrs. Helen Monsen.)

Q. Can you state what his official capacity was?

A. Well, I don't know whether he was reporting then or whether he was on the desk at that time. Sometimes he made up the paper; sometimes he reported. I know that that day he did get the story that is involved in this case.

Q. Now I show you, Mrs. Monsen, the front page of the Daily Alaska Empire printed on September 25, 1952, the subject of these suits, and if you need it to refresh your memory——

A. Yes. [437]

Q. I will ask you if you had anything to do with the make-up and reporting contained on that page?

A. No.

Q. Mrs. Monsen, did you know what the make-up of the page was going to be on September 25, 1952?

A. No.

Q. Did Mr. Beard or Mr. Daum consult you in any respect concerning the so-called ferry fund?

A. No. I don't know whether we talked about it before or after that. All I knew was what people in town knew, just general information. I didn't know anything about their——

Q. Now, in your general supervisory capacity didn't your Managing Editors and desk men check with you on matters of that nature?

A. I don't know what else I might have been doing at that time. I had a lot of other things to do besides running the Empire. I realize that it was the most important thing I should have been doing, but I certainly was not consulted.

(Deposition of Mrs. Helen Monsen.)

Q. Then is it your testimony, Mrs. Monsen, that you had absolutely nothing whatsoever to do with the items contained on the front page of that paper on September 25, 1952?

A. I might have written some of the stories about the [438] locals, and so on. Those are the things that I usually did, the small items.

Q. Mrs. Monsen, there is an editorial on that page entitled "Start Talking Boys"——

A. Yes.

Q. ——that is described in parentheses below as an editorial. Did you have anything to do with the preparation of that editorial? A. No.

Q. Do you know who wrote that editorial?

A. I don't know whether Jack Daum did or whether Jim Beard did.

Q. Who ordinarily wrote your editorials?

A. Either one of them. Very frequently I did, but this is something that I hadn't done.

Q. Then is it your testimony that you first learned that that editorial, "Start Talking, Boys," was to be printed, was when the paper came out on September 25? A. After it came out: yes.

Q. That paper you do hold in your hands is the front page of your paper as of that date, is it not?

A. It apparently is.

Q. Mrs. Monsen, did Mr. Beard or Mr. Daum have any instructions from you concerning their editorial or news reporting policy with respect to the Gruening administration? [439]

A. No. I know what you are referring to, be-

(Deposition of Mrs. Helen Monsen.)

cause I have seen the notes on Mr. McFarland's deposition and——

Q. The answer is "no"? A. No.

Q. You have not instructed them in any fashion whatsoever respecting the attitude they were to reflect in your paper concerning the Gruening administration? A. No.

Q. Well, Mrs. Monsen, I will ask you whether or not you knew about this so-called ferry fund prior to the date of publication of September 25?

A. That I don't know. I don't recall whether it was generally known at the time or not. I just don't know. If it was generally known, I presume I did.

Q. Isn't it a fact then, Mrs. Monsen, that you carried an extreme dislike for Governor Gruening personally? A. No.

Q. Isn't it a fact that you instructed Mr. Daum and Mr. Beard that they were to do everything possible to expose or embarrass the Gruening administration? A. No.

Q. Did you not instruct them at any time concerning their attitude with respect to Gruening?

A. No.

Q. You have read Mr. McFarland's deposition, have you not? [440]

A. Yes. By the way, Mr. McFarland was employed when I was out of town. Now, I don't know what Mr. Beard may have told him.

Q. Do you deny that you ever on any occasion instructed Mr. McFarland with respect to his edi-

(Deposition of Mrs. Helen Monsen.)

torial and/or news reporting policy with respect to the Gruening administration?

A. I don't deny that. I know what he is referring to, is the article about Mr. Gruening—it was an interview with Mr. Gruening, I believe, when he came back from attending the Democratic National Convention, and Mr. Gruening had come out at the Convention in favor of Kefauver and when he came back to Juneau, in his first interview, apparently he told Mr. McFarland or Mr. Jensen—whoever was covering the office then, I don't recall which one—oh, just a very fancy story about how he was for Stevenson and how Stevenson was the finest man to have been nominated, and so on. I did not see that paper, by the way, until it was on the street. Someone stopped me on the street and said "Are they trying to use the Empire, Helen?"

Q. Well, Mrs. Monsen, don't quote what someone on the street might have said.

A. I can tell you who the man was.

Q. That still doesn't make it admissible if I object to it. [441]

A. All right. Well, anyway, that is what made me go back to the office to read the paper and find out what had been put in. I didn't object previously. They got the story in, and they let Mr. Gruening use them, use the Empire, for his ends. All he wanted to do—this is a presumption on my part, but I think I know the man pretty well—was to get a story in the Empire that he could cut out and send back to Democratic headquarters and say

(Deposition of Mrs. Helen Monsen.)

"see," and that is what Mr. McFarland had managed to do for him.

Q. Your Managing Editor, Mr. McFarland, printed that report of what went on at the Democratic Convention, didn't he?

A. What do you mean?

Q. Mr. McFarland printed the report Mr. Gruening gave of what occurred at the Democratic Convention?

A. He was giving—he had already come out for Mr. Kefauver, but then he wanted a record—it was in the A. P. dispatches when he was back at the Democratic Convention, but he wanted the record changed, don't you see, to make him a supporter, not of Mr. Stevenson, who was a candidate at this time that he was supporting Kefauver—he wanted to indicate that he was a Stevenson supporter; that the best man had been chosen.

Q. Of course, there is nothing wrong with supporting the man who is finally nominated, as far as party politics goes, [442] if you are going to have to put up with him, is there?

Now, after you saw this report of Governor Gruening as to what transpired at the Democratic Convention——

A. It wasn't a report of what transpired at the Democratic Convention.

Q. Did you talk with Mr. McFarland about what he had done? A. Yes, I did.

Q. And didn't you as a matter of fact bawl him out for doing it?

(Deposition of Mrs. Helen Monsen.)

A. I told him that I had been met on the street and that I had been bawled out first for letting people use me, and that——

Q. Well, just answer the question. Did you bawl Mr. McFarland out for doing it?

A. No, I just told him what had transpired, that I had been bawled out down the street for letting my staff and Mr. Gruening use the Empire.

Q. Didn't you tell him that you had never known that your newspaper would report anything like that as coming from Governor Gruening?

A. No, I don't think I did.

Q. Didn't Mr. McFarland, as the result of that interview with you, offer to quit his position?

A. Yes; but by the way, he was already, apparently, to start another paper—he and Mr. Gruening, I had been [443] told, were all ready to go on a paper of their own, so that's why—he didn't quit on my account.

Q. Did he quit or was he fired?

A. He was not fired.

Q. Do you recall when he left the employ of the Daily Alaska Empire?

A. No; I can find out, though.

Q. Did you not, on another occasion, have a severe argument with Mr. McFarland over his reporting certain news items received from Associated or United Press in connection with the Palmer airport?

A. I don't know. Most of the Palmer airport

(Deposition of Mrs. Helen Monsen.)

stuff was before Mr. McFarland's time. I haven't any idea.

Q. Do you recall one incident after Mr. McFarland was working for the Empire, concerning the Palmer airport?

A. I would have to look it up, go through the papers. Most of my memory of that, the Palmer airport, is two years before this, practically before he came to work for us. I do recall an argument with Mr. McFarland up at my house in 1951 when Mr. Spencer and Curtis Shattuck were there. This was after Korea, and Mrs. McFarland and Mr. McFarland, but especially Mrs. McFarland, were quite bold in calling the United States the aggressor nation in the war and so on and so forth.

Q. Not concerning Gruening and the news policy in the [444] Empire?

A. Yes; this is indicating that Mr. McFarland or—the Empire has tried to maintain a conservative—well, let's see, the Empire wouldn't call the United States an aggressor nation, but the McFarlands called the United States the aggressor nation in the Korean War. Does that mean anything?

Q. No, not to me it doesn't, Mrs. Monsen.

A. I mean that indicates why I might have had an argument with Mr. McFarland over something like that. That indicates what his feelings were.

Q. Your father was formerly Governor of Alaska? A. Yes.

Q. And you were more or less his secretary up to the time of his death, were you not?

(Deposition of Mrs. Helen Monsen.)

A. No.

Q. Well, you cared for him constantly and assisted him in his duties as much as you could, didn't you? A. Yes, I did.

Q. Isn't it a fact that you had the ambition of replacing your father as Governor when the new appointment was made?

A. What? Mr. Nesbett——

Q. Just answer the question.

A. No! [445]

Q. You knew Governor Gruening before he was Governor and was in the——

A. Is that supposed to be one of the things that—I'm sorry, but you can't spring questions like that on me and expect me not to comment.

Q. I have the right to ask them and if you can, you should answer them.

A. Yes, but I mean—I'm sorry.

Q. That's all right.

Isn't it a fact that you knew Governor Gruening before he was appointed Governor and was in the Territorial Insular Affairs Department of the Bureau of Interior? A. Yes, that is true.

Q. Were you not friendly with him at that time?

A. Yes, we were friends.

Q. You became somewhat, quite a great deal, less friendly after he received the appointment as Governor of Alaska, did you not?

A. No. I think you will find an editorial in the Empire in December, 1939, in which the Empire welcomed Governor Gruening to Juneau with open

(Deposition of Mrs. Helen Monsen.)

arms. The Empire's first choice had been an Alaskan for Governor, and I have forgotten the circumstances, but it seems to me that it was Jim Connors—at that time the Collector of Customs—whom [446] the Empire would have supported, but when it became apparent Governor Gruening was getting the appointment, we were just as anxious to have Governor Gruening have it as anybody else.

Q. Didn't your attitude toward Governor Gruening become markedly less friendly after Governor Gruening had required the Troy estate to refund certain monies paid for the compilation and publication of a book called "Guide to Alaska"?

A. No. Mr. Nesbett, you should ask Mr. Faulkner about that situation, because——

Q. Yes, but the idea here is——

A. I know, but your questions are leading questions in which you are attempting to malign me and there is no——

Q. I am not attempting to——

A. Yes, you are. You are trying to keep me from getting things in the record. You are just trying to get things in the record.

Q. Well, Mr. Faulkner will examine you when I am finished.

A. Well, all right. Mr. Faulkner knows more about that than I do and he knows that that is just another one of Mr. Gruening's little deals to try to bear down on me.

Q. "Another one of his little deals"—what do you mean? A. Well, to make me unhappy.

(Deposition of Mrs. Helen Monsen.)

Q. Make you unhappy? [447]

A. Yes; but by the way, even so——

Q. Well, you try to state——

Mr. Faulkner: Let her finish, Mr. Nesbett.

A. There is no—well, all the things, personal things and so on, that Mr. Gruening has done or his family have done to hurt me, prick me, and so on and so forth. I know what you want to do. You want to make, oh, develop, this theme that was started with Jack McFarland, that I hated Governor Gruening; I don't hate Governor Gruening. There is not hate in my heart, not even about you, Mr. Nesbett.

Q. Well, you shouldn't hate me.

A. No, but I mean that I am just not that kind of person. I don't like the things Governor Gruening has done to Alaska, and they are completely separate from any personal feeling about him. I think he is a tremendously bright guy, and I don't know, I just don't—you just can't develop any feeling of hatred toward him because there just isn't any. If Mr. McFarland says that I hated Governor Gruening or anybody else, Mr. McFarland is lying there, I'm sorry.

Q. It is a fact, isn't it, that the Empire, at your instructions, for a period of over a year or many, many months, refused even to print the Governor's name, "Governor Gruening," as such? [448]

A. No. I don't know what that was all about, but it occurred when I was in Seattle. At that time Bill Carter was running the paper. He ran a story,

(Deposition of Mrs. Helen Monsen.)

if I remember—Mr. Faulkner might remember—but it seems to me it had to do with the Alaska Juneau, in 1944, when they were closing the mine—I don't know whether that is correct or not, and Bill ran a story, or a part—Mr. Gruening had a cute little habit of sending things down to the Empire late in the afternoon so the stories would get over the radio before they would get into the Empire, and Bill cut the story, shortened the story, and Mr. Gruening was very angry about that and called up Bill and I think he told him—you see, I don't recall; I wasn't there; this is just hearsay—but Mr. Gruening, I believe, said that he never wanted anything of his published again unless it was published in full, and in the course of their conversation I think he said "just don't publish my name" or don't—really his instructions, as I recall.

Q. Didn't he say "I won't give you any quotes, but anything that goes to the Empire will have to be in writing from now on" after the unhappy incident? A. I don't know. I wasn't there.

Q. Wasn't that Governor Gruening's policy during the latter seven or eight years of his term?

A. I don't know. [449]

Q. Well, wouldn't you know, being in a supervisory capacity most of the time?

A. No; I still don't know.

Q. Well, can you then answer the question I put to you previously: wasn't it the policy of the Empire, at your instructions, not to print the Gover-

(Deposition of Mrs. Helen Monsen.)

nor's name as such, but rather to simply refer to him as the Governor of Alaska?

A. Whatever it was that started this——

Q. Can you just answer the question now?

A. No.

Q. Well, isn't it a fact that the Juneau Empire in printing the list of names of those listed in "Who's Who" deliberately omitted the names of Governor Gruening and Frank Metcalf?

A. No, I am sure they didn't.

Q. Are you sure they didn't?

A. I don't know whether it was done or not, but I am sure they didn't do that. It would certainly not be at my instructions.

Q. Now, as the result of these, as you expressed them, "little deals" of Governor Gruening, didn't you become less friendly toward him in your policy of reporting his official acts and doings?

A. Apparently it just depended upon which official acts. [450] Some things he wanted in the paper. By the way, can I tell about the time he threatened me with libel if we published—in 1947, during the legislature?

Q. Well, it isn't quite responsive to my question. Will you answer that, please?

A. It just depended on what they published. Mr. Gruening loved publicity and he would rather have you say something "agin" him than not say anything at all. I don't know what they did about it. I disapproved of a lot of the things that the so-called "palace guard" were perpetrating, includ-

(Deposition of Mrs. Helen Monsen.)

ing the Palmer airport. I didn't approve of that, nor, I believe, did Congress. I didn't approve of the—I don't believe his fight for statehood was honest. Two people—one was Colonel Olson, and the other was Mr. Rasmusson—told me that. To him statehood was a flag-waving, it was a popularity deal; it was a thing that was popular and that he knew that Alaska couldn't support statehood at this time, but it was something that you had to come out and you had to be for it, and so on and so forth. I want statehood for Alaska, but I don't want it until we can pay for it, and that was definitely a fight between the Empire and Mr. Gruening. He made it personal.

Q. How could Mr. Gruening make it personal when he had no newspaper? [451]

A. Oh, my word; what about the Anchorage Times, what about the Ketchikan Chronicle——

Q. I mean he couldn't make it a personal fight against the Empire through those publications, could he?

A. No, but he made a beautiful little——

(Reading suspended.)

Mr. Faulkner: She was interrupted.

(Reading resumed.)

Q. Well, you don't like the Governor at all, do you?

(Reading suspended.)

(Deposition of Mrs. Helen Monsen.)

Mr. Nesbett: Now, your Honor, I object to that. It isn't a proper, true reading of the deposition that she was interrupted. As a matter of fact, she had a habit of trailing off and stopping, and it isn't proper to interpret that particular bit of testimony as an interruption on my part.

Mr. Faulkner: Maybe not, Mr. Nesbett. I am sorry. There are just some marks there, and the answer wasn't finished. Some of them are like that.

(Reading resumed.)

Q. Well, you don't like the Governor at all, do you?

A. I don't dislike Governor Gruening. I dislike the things he stands for. I dislike what he has done to the Democratic Party in Alaska. I think the Democratic Party in Alaska used to be a good party, but there are a lot [452] of conservative Democrats who feel the way I do.

Q. You feel rather strongly on that point, don't you?

A. No. Don't try to get hatred into this, or malice into this, because there is none, sir.

Q. Well, I was just wondering, as the owner of a large capital newspaper, do you still maintain that you did not instruct your editorial writers and Managing Editors with respect to how you felt? After all, it was your newspaper.

A. In some cases it wasn't necessary, but there was never any instruction, there was never any tell-

(Deposition of Mrs. Helen Monsen.)

ing them, et cetera, and if Jim Beard briefed McFarland, it was done while I was away, and——

Q. If Jim Beard did what?

A. Briefed McFarland—that is what Mac said in his desposition, that Jim had briefed him. He said we had both briefed him, and that is, as far as I am concerned, untrue, because he was employed when I was out of town and what happened then I don't know. Any briefing would have been just this, that the Empire did not approve of what we believed he was trying to do in Alaska.

Q. When you say that the Empire did not approve, you mean you, don't you? A. Yes.

Q. And your thoughts, attitudes, policies or objections [453] were voiced through your newspaper naturally, were they not?

A. A whole lot was in the paper that I knew nothing about.

Q. But you knew about most of what was printed in the paper, did you not?

A. No, I was away a great deal.

Q. Didn't you dictate any policy in general to your——

A. In most cases it was not necessary, because most of the people who worked on the Empire knew about how I felt about various and sundry things, and I tried to be fair and I tried to publish nothing except what I believed the people had a right to know. That is part of the duty of a newspaper, you know.

Q. When you say in most cases it was not neces-

(Deposition of Mrs. Helen Monsen.)

sary, do you refer to instances in the cases of employees such as Small and McFarland?

A. I don't know anything about—Mr. Small was employed when I was away, too. I don't know anything about the situation there at all.

Q. Mr. Small worked there under you for a considerable period of time, did he not?

A. Yes. He was there. His wife worked for us, his daughter worked for us. I don't know, but he was employed while I was away, and he left when I was away. I don't know why he left. [454]

Q. Well, he was employed most of the time he was there under you, was he not?

A. Not especially under me; no, no; it would be very indirectly. My principal association with the Small family was when we were working together to get the Seattle Symphony up here and my association was on that. That, of course, has nothing——

Q. Was that the only association you had with him?

A. No, let's see—he was there during, as I recall, during the "Princess Kathleen" wreck. I don't remember what else.

Q. Did you work at the newspaper office on September 24, 1952, the day before the paper upon which these actions are based was printed?

A. Golly, I don't know. I presume I did.

Q. You worked there pretty regularly every day, didn't you?

A. When I was in town I did. I didn't have

(Deposition of Mrs. Helen Monsen.)

office hours. I did the things that had to be done, that is, as many of them as I could do; that's all.

Q. What in general were those things that had to be done—in general?

A. Answering letters, trying to figure out the answers to things that came up as they were brought to me—I don't know, just——

Q. Not writing editorials or establishing policies? [455]

A. Sometimes. Sometimes I did and sometimes I didn't. I had written very few until after 1953.

Q. Do you recall the day of September 25, 1952, when this front page I have shown you was printed, don't you, Mrs. Monsen?

A. Yes; I remember the paper was out and by the way, somebody, I think it was Mr. Faulkner, told me that Mr. Small had said that Mr. Faulkner had advised me against printing this. I think Mr. Faulkner will tell you that Mr. Small did not know what he was talking about, because Mr. Faulkner didn't see the editorial until after it was printed either, and Mr. Small was imagining——

Q. Actually, Mr. Small said in his deposition that Mr. Faulkner called you after the paper had hit the streets and advised you that it was libelous.

A. I don't think he did.

Q. Don't you recall receiving a phone call from Mr. Faulkner on the afternoon the paper went on the streets and discussing the matter with him in the presence of John Small? A. No.

(Deposition of Mrs. Helen Monsen.)

Q. Not over the telephone? A. No.

Q. And you don't know whether such a discussion occurred or not then; is that your testimony? [456] A. No.

Q. It could have, but you might have forgotten it; is that right?

A. I don't think it occurred. Mr. Faulkner would know. My first memory of any talk about it at all was the next day, the next morning.

Q. With whom was that discussion?

A. I think with——

(Reading suspended.)

Mr. Nesbett: "had."

Mr. Faulkner: "had"; yes.

(Reading resumed.)

Q. With whom was that discussion had?

A. I think with—Mr. Banfield came into the office and I came over and talked to Mr. Faulkner about it.

Q. Mr. Banfield came in your office and advised you that it was libelous, did he not?

A. I don't know whether he said that or not. He said it should not have——

Mr. Faulkner: If you don't remember those things, Helen——

A. I don't remember, really and truly. I just know that Norman came into the office and we discussed it, and then I came over and talked to Mr. Faulkner, and that's that.

(Deposition of Mrs. Helen Monsen.)

Q. If you don't want to divulge what transpired between you [457] and your attorneys, all right. I was merely referring to Mr. Small's statement. Have you read his deposition?

A. No, I have not. Mr. Faulkner told me something about it, though, and said that he knew and I knew that I had had no discussion with Mr. Faulkner and consequently John was just completely incorrect. He didn't have any idea about it.

Q. Isn't it a fact that numerous conferences were held in your office over in the Empire between yourself and Mr. Beard on various occasions and Mr. Gilmore of the Canned Salmon Industry and Mr. Marcus Jensen, concerning the policy of the Empire as respected the Gruening administration?

A. No. I think about that, wasn't Mark running for office then? If we had any conversations, it was probably about Mark's candidacy. I would have to look it up to see.

Q. Did you have any conference with Auditor Neil Moore just prior to the printing of the September 25 edition of the Empire?

A. That I don't recall. If there were conferences, they were probably with Jim Beard, but I don't know.

Q. But you frequently did have conferences with Mr. Moore, did you not?

A. Well, I think that is dignifying it. Make it conversations, not conferences. [458]

Q. Quite often in your office; isn't that correct?

(Deposition of Mrs. Helen Monsen.)

A. Neil used to come down and pick up his paper at the end of the day, and he would just come in and say "hello," that would be all.

Q. Mr. Moore was quite opposed to Governor Gruening, was he not?

A. Golly, I don't know whether—something that both Neil and I were distressed about and had been for a long time, and Mark, too, that had been one of Mr. Gruening's pets, was the Union Bank in Anchorage, and we knew that the records, the minutes of the Banking Board, had been changed and that, by the way, never got in the paper. It was just one of those things that probably should have gone in but——

Q. Didn't you consider it your duty to print it?

A. Sure did, but it didn't get in. At the time it came up before the legislature in 1947, Mr. Gruening threatened me with libel if it were published, and I knew nothing about it. I came over here and asked Mr. Faulkner, and at that time the matter had been settled and it was hoped that the Union Bank was once more solvent or that some arrangement had been made to protect the depositors. There was no question of libel about anything that was said at the time.

Q. Why didn't you print it? [459]

A. To protect the depositors of the bank, and there is a law, isn't there, Mr. Faulkner, not about libel but about any story that might start a run on a bank?

Q. False story.

A. Well, then, I am wrong, but that wouldn't

(Deposition of Mrs. Helen Monsen.)

have been a false story. The story was correct.

Q. Did you discuss this publication with Mr. Beard the day that it was made, the publication of September 25, 1952?

A. I don't know. I don't remember. Probably after the paper was out—I don't remember that. I have a faint recollection of him standing in the front office with a paper, but I don't remember.

Q. Then is it your testimony that although the entire front page of the Empire of September 25 was devoted to this subject of the ferry fund and so forth, that you knew nothing about what was going to hit the streets that day in the publication?

A. I would imagine that there was probably a Chamber of Commerce meeting and I didn't get back to the Empire until the paper was nearly out.

Q. Well, ordinarily you would have known, wouldn't you? A. No, I wouldn't know.

Q. If they are going to devote the entire front page to one subject——

A. No, I wouldn't. I'll bet there are lots of times that [460] the Anchorage Times comes out without Mr. Atwood knowing what is on the front page of the paper, or that the Anchorage News comes out, without Mr. Brown knowing what is on the front page of the paper, and probably in the Ketchikan papers it is different, but I don't know.

Q. But ordinarily if the entire front page is to be devoted to one subject, the publisher or the Editor would know about it, would he not?

(Deposition of Mrs. Helen Monsen.)

A. Probably.

Mr. Nesbett: I believe that is all, Mr. Faulkner.

Q. (By Mr. Faulkner): Mrs. Monsen, I believe there are just one or two questions I will ask you. You mentioned the fact that the Governor, Gruening, called you and asked you not to publish something that happened with reference to the Union Bank. Now, wasn't that a resolution which was offered in the Senate that he was talking about?

A. Yes.

Q. And did he on that occasion tell you that if you published it you would be sued for libel?

A. Yes.

Q. And what did you do then? Did you come to me?

A. I came to you and asked you about this. It had come up on the floor of the Senate, and consequently there would have been no libel in publishing it, because it was [461] privileged material, that is what you called it, isn't it?

Q. That is what I told you. I told you it was absolutely privileged. A. Yes.

Q. But suggested that you do not publish the result of this examination in the Senate because it might cause a run on the bank and the depositors, the innocent depositors, would lose their money. A. That was what you said.

Q. Then when I told you that, did you not call

(Deposition of Mrs. Helen Monsen.)

Governor Gruening and tell him that you had been advised by your attorney that that would not be libel to publish that resolution, but that you were not going to publish it anyway?

A. Yes, I did.

Q. And gave him the reasons? A. Yes.

Q. Now, later on, wasn't that resolution published and printed in the Senate Journal?

A. Yes. That time was one of the times that Mr. Gruening suggested we get together to settle the affairs of Alaska over a cup of tea; yes.

Q. Now, on another occasion long before that did you meet Governor Gruening at the Salmon Creek Roadhouse and have some discussion with him about the policy of running [462] Alaska?

A. Yes; that was in '47. It was the night of the election in 1948, and I remember that because Dan Mahoney and Lucille Mahoney had come by the office and we were wondering if there were any election returns and so forth, and we went to the Country Club for dinner and we were there quite early, and while we were there a large party came in and Mr. Gruening was there and Bob Bartlett and a whole lot of people, anyway, and as we were leaving Mr. Gruening came over to me and asked when we were going to get together over that cup of tea; that "if we could only get together, Helen, we could run Alaska," and Mike Monagle was just

(Deposition of Mrs. Helen Monsen.)
chatting with me and I said "Mike, you stand right here with me. I want you here."

Q. Now, Mr. Nesbett asked you about some money that was paid your father's estate by the McMillan Company, although he did not mention the name, which was afterward refunded. Did you ever hear until today that Governor Gruening had the slightest connection with that?

A. That was the first time I had ever heard Governor Gruening mentioned in connection with it.

Mr. Faulkner: I think that is all.

Mr. Nesbett: I have no further questions. Thank you.

(Reading suspended.)

Mr. Faulkner: And shall I read the remainder of it? [463]

Mr. Nesbett: Yes, please.

(Reading resumed.)

Mr. Faulkner: This deposition was taken on short notice, and I had no opportunity to confer with Mrs. Monsen about it until she came in here to give her testimony, and we will, of course, have the right to call her on the stand, because I want to examine her in chief when the case is on trial.

Mr. Nesbett: This is more for the purpose of discovery.

It was stipulated between the counsel for plain-

(Deposition of Mrs. Helen Monsen.)

tiffs and counsel for defendant that the deposition of Mrs. Helen Monsen may be used on the trial of this cause by either party without objections, and that all objections to the form of the questions and objections to the answers are waived, and that the entire deposition may be read into the record.

It was also stipulated that the signature of Mrs. Helen Monsen to this deposition is waived.

It is further stipulated that notwithstanding the fact that the witness Mrs. Helen Monsen was called by the plaintiffs, the plaintiffs are not bound by the testimony of the witness or any portion thereof.

(Reading concluded.)

Mr. Faulkner: And then the stenographer's certificate, [464] and there appears the signature on the original, I believe. I offer the deposition in evidence now pursuant to the stipulation.

Mr. Nesbett: In evidence, your Honor?

The Court: We had already admitted it in evidence, I thought or presumed, before it was read. I beg your pardon, Mr. Nesbett. Did you have something? What was it you had started to say?

Mr. Nesbett: I was going to say it is not an exhibit in itself to go to the jury.

The Court: No.

Mr. Faulkner: No; it is not an exhibit.

HELEN MONSEN

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Faulkner:

Q. Mrs. Monsen, will you please state your name? A. Helen Monsen.

Q. And where do you live A. Juneau.

Q. How long have you lived in Juneau?

A. Most of my life; since 1913.

Q. And what have you been doing in that time; what do you do; what is your position there, or was in 1952? [465]

A. President of the Empire Printing Company.

Q. Well, that has been gone into in your deposition. I am going to try to avoid repeating those questions as much as I can. You heard the deposition read and that is all in evidence. Now, Mrs. Monsen, first, I want to ask you if you have heard here read and have read over yourself the deposition of a man named John Small? A. Yes, I have.

Q. Now, in that deposition Mr. Small states that after the publications complained of on September 25, 1952, Mr. Faulkner, your attorney, called you on the telephone in a loud voice and in plain language told you that the articles as published were libelous; is that so? A. No.

Q. How long have you known Mr. Faulkner.

A. Since I was in high school.

(Testimony of Helen Monsen.)

Q. And have you known him quite well?

A. Quite well.

Q. Seen him very frequently?

A. Frequently.

Q. Practically every day when in Juneau?

A. Yes.

Q. Did you ever know Mr. Faulkner to talk over the telephone in a loud voice to anybody?

A. No. [466]

Q. Did you in all your association with him know him at any time or place to use profane language in any form? A. No.

Q. Now, you say the testimony of Mr. Small then in that respect is untrue?

A. That is completely untrue. I think anybody who knows Mr. Faulkner would verify that.

Q. Now, do you remember coming to my office the day after the publication of September 25th?

A. Yes.

Q. And talking to me about it? A. Yes.

Q. And is it a fact that at that time I told you it was not libelous?

A. You told me that it was not libelous.

Q. Now, Mrs. Monsen, your testimony here is that in these publications of Septemer 25, 1952, they were not shown to you and you did not see them until after the paper was out and published; is that right? A. That is right.

Q. Now, you said in your deposition there that that frequently happened?

(Testimony of Helen Monsen.)

A. It happens in any newspaper office. Very seldom do you see the front page of a paper.

Q. In the past ten years you have been managing the paper [467] there?

A. Yes. Mr. Faulkner, I have been—when I have been away from Alaska——

Q. Well, I was going to ask you that. Have you been manager most of the time in the last ten years?

A. Yes.

Q. Until the spring of 1955? A. Yes.

Q. And then what did you do with the paper?

A. I sold the paper to Mr. Allen.

Q. You sold it to Mr. Allen? A. Yes.

Q. Now, in that period, in that whole period there, ten years or more, you say you have been away frequently?

A. In 1943 Doctor Carter sent me to Seattle because I had a tubercular kidney and it had to be removed, and that took a while, and then later—I hate talking about myself.

Q. Tell us, were you in the hospital and laid up in Seattle under the doctor's advice? A. Yes.

Q. That was after Governor Gruening came then? A. That was in 1943.

Q. And I might ask you, who owns the paper?

A. The Empire Printing Company.

Q. I mean—yes—but who owned it during this time under [468] discussion?

(Testimony of Helen Monsen.)

A. You mean how were the shares divided? My sister and myself owned the Empire Printing Company.

Q. You owned the stock?

A. Yes; and I think you had one share.

Q. And you have yourself——

A. And Dorothy Lingo. I had 465 shares, and Dorothy had 200 shares.

Q. You had a little over two-thirds; is that right? A. Yes, sir.

Q. You say frequently that the paper would come out and you wouldn't see the front page until after it was out. Now, in operating the paper when you were in Juneau, what did you do? You told in your deposition part of it. But what did you do in connection with the paper, your duties?

A. Frankly, I did most of the odd jobs. I think Mr. Daum said this morning that I was a reporter on the paper, and I was my own stenographer and would order——

Q. Did you have to supervise the management, the financial affairs, the income and outgo?

A. It was I who started worrying when one had to meet a payroll.

Q. You had quite a large payroll there and changing help from time to time?

A. Yes. [469]

(Testimony of Helen Monsen.)

Q. Quite frequently?

A. Except we have one man who has been there for over thirty-five years and is still there.

Q. Now, Mrs. Monsen, at the outset let's go to the deposition of Mr. McFarland, and Mr. McFarland's deposition was read here, and he stated that you had considerable animosity toward Governor Gruening but that you were a very nice lady after all, or something to that effect. Did you have any malice or animosity toward Governor Gruening at any time?

A. I think Governor Gruening knows that there is no personal animosity, no hatred, in my heart for him. Our differences have been matters of policy.

Q. And matters of informing the public?

A. Yes; and our policies about Alaska and so on and so forth. That doesn't mean I am right. I might have been wrong. But there were things I believed in that Governor Gruening did not believe in, and things he believed in that I did not believe in; and I think that is all right for a newspaper to express such opinions.

Q. Now, I might ask you, Mrs. Monsen, in writing up the news was it your custom there to gather the news, especially news of all public officials, and publish it as far as you could of public affairs?

A. Yes; that is true. [470]

Q. And to comment on it? A. Yes.

(Testimony of Helen Monsen.)

Q. Sometimes it required comment?

A. Yes.

Q. Now, for instance, do you remember the steamship strike in 1952? A. Yes.

Q. Did you always comment on the news, or sometimes not?

A. Well, apparently that is one time when we did not.

Q. You heard Mr. Daum tell about the officials of the Territory who were absent during that strike? A. Yes.

Q. Do you have a list of them? A. Yes.

Q. Will you give it to the jury?

A. I think that Mr. Gruening was lecturing then. He gave that, I believe, in his testimony, too. And Mr. Williams was out of town.

Q. The Attorney General?

A. Yes, the Attorney General. And his assistant; and Mr. Mullaney.

Q. Who was he?

A. The Tax Commissioner. And I don't know who else.

Q. Mr. Metcalf? A. Mr. Metcalf, too. [471]

Q. What about the Commissioner of Labor?

A. And Henry Benson, the Commissioner of Labor.

Q. Now, did all those items appear in the paper?

A. Apparently they did, as news items.

(Testimony of Helen Monsen.)

Q. Did you ever make any comment on the whole situation? A. No.

Q. Now, Mr. Kay asked Mr. Daum about printing editorials on the front page. Did you frequently have editorials, or not on the front page?

A. Not frequently, but whenever—it was not unusual.

Q. Now, Mr. Daum appeared here this morning and testified and he brought some notes that he had made at the time he interviewed the various officials concerned in this ferry fund. I think he said he got those notes from you. Why were those notes preserved?

A. Because of the threat of libel.

Q. Because of the libel suit?

A. We had been told just as soon as the paper was out by the people involved that we were going to be sued for libel, and I happened to run into the notes in Jack's desk and just by chance kept them, and the reason I happened to have them now is because on the first of June, when I sold the paper to Mr. Allen, we cleaned out files. Those files were still in my—I mean, the boxes in which everything had been put were still in my home, and in [472] order to lease my home on the first of November I had to go through them all, and I ran into quite a number of things.

Q. You mean, you had to take those all away from the Empire when you sold out?

(Testimony of Helen Monsen.)

A. I didn't have to but I did.

Q. I mean you did?

A. I wouldn't have found them if I hadn't.

Q. Now, I think you have testified about—well, you didn't testify. I might ask you about the testimony of Governor Gruening in which he identified an editorial that you wrote at the time he came to Alaska as Governor, and I might ask you if you welcomed him personally when he came there?

A. Yes.

Q. And did you set up any function for him and Mrs. Gruening when they arrived?

A. I think the night they arrived we got as many of the Democratic officials as we could, the committee members and so on, and that night, the night he arrived, he was sworn into office, as I recall. He can verify that. And then right after that Vida Bartlett and I had a tea for Mrs. Gruening.

Q. Now, when did you, do you remember when you began to differ with his policies, about [473] when?

A. Well, during the 1941 Legislature, as I recall.

Q. And what was the first, do you remember your first difference?

A. I recall that the Empire was not going along with the plan to build five armories in Alaska for $750,000.00.

Mr. Nesbett: I can't hear the witness.

Q. (By Mr. Faulkner): Speak a little louder if you can. A. I am awfully sorry.

(Testimony of Helen Monsen.)

Q. If you get tired, just let us know. If you can, speak a little louder.

A. The Empire did not go along with the policy of Mr. Gruening's program to build five armories in Alaska for a Territorial Guard, I believe. If the Territory had that much money to spend, schools would have been better to spend it on, I think. But then Mr. Connors, who was an old friend of the family, came down——

Q. Who?

A. Mr. Conners. He came down to the Empire office and asked me why the Empire wasn't supporting the Democratic——

Mr. Nesbett: Your Honor, I have tried to be extremely liberal and lenient in Mr. Faulkner's leading direct examination, but I think that also now I know she is going into a lot of hearsay, and I wish your Honor would caution her——

A. Oh, I beg your pardon.

Mr. Nesbett: ——as to hearsay. [474]

Mr. Faulkner: Well, it was——

A. So much——

Mr. Nesbett: It was——

A. ——has been said about me.

The Court: If you will permit me to consider the objection——

A. I am sorry.

The Court: The objection is to hearsay. I do not find that appears. The question was asked as to when she first began to disagree with Governor Gruening. Now, that may be answered, I think,

(Testimony of Helen Monsen.)

without reciting what was said to you. I think that is the real objection at this time.

A. Oh, I beg your pardon.

The Court: If you could, limit just your answer to that, not what was told you by others, but the reason for your disagreement, which I think you have already stated.

Q. (By Mr. Faulkner): And that will shorten it a great deal, Helen.

A. All right. I beg your pardon.

The Court: That is, we do not care to go into the details of your disagreement, but only the reason for it.

Mr. Faulkner: Yes; that is it.

The Court: That is the point.

Q. (By Mr. Faulkner): What is the reason, what the disagreements were about, if you can recall? [475]

The Court: I think she has already answered that.

A. I don't know how to go into this any further, but there were several things during that session of the Legislature that disturbed us. Oh, I don't know whether this is hearsay or not, but it disturbed us when this man came into my office and told me—can I tell you this?

Mr. Nesbett: Your Honor——

Q. (By Mr. Faulkner): No. Don't tell what somebody told you. A. I beg your pardon.

Mr. Nesbett: I think the question has been answered, your Honor.

(Testimony of Helen Monsen.)

The Court: Well, again, if there were other things in which you disagreed, you may state generally what they were, but not what somebody told you. Do you get the difference?

A. Well, let's see——

Q. (By Mr. Faulkner): What the policies were and what things you disagreed about.

A. And I disagreed further—oh, let's see—I just can't think.

Q. Well, I think there is some testimony here that you disagreed over the Palmer Airport?

A. Oh, yes, definitely.

Q. And the Union Bank trouble?

A. Yes. [476]

Q. And did you—— A. And purges.

Q. Well, that has been gone into in the deposition, I think. Now, Mrs. Monsen, I have not asked you anything about the other two plaintiffs. Have you ever had any animosity or bitterness or malice toward Henry Roden?

A. I think Henry knows that I haven't.

Mr. Nesbett: I didn't hear the answer.

A. I think Henry—pardon me—Mr. Roden knows that I have not had any animosity or malice toward him.

Q. (By Mr. Faulkner): Have you been more than ordinarily friendly with him all these years?

A. Yes; I would think so.

Q. Have you written eulogistic editorials on him? A. Yes, sir.

Q. And published other things that were all very good; is that right?

(Testimony of Helen Monsen.)

A. I believe so; yes, including stories or editorials that Henry has written, too.

Q. He has written editorials that you put in the paper, too? A. Yes.

Q. Now, Mrs. Monsen, have you any animosity or hard feelings or malice toward him today?

A. No.

Q. Or toward Governor Gruening? [477]

A. No.

Q. Or to Mr. Metcalf? A. No.

Q. Have you ever had any quarrel or any trouble with Mr. Metcalf? A. No.

Q. At any time? Or the paper; or has the paper had?

A. I don't think so, unless it is the subject of the suit.

Q. And do you have any malice or animosity or bitter feeling against him? A. No.

Q. Have you ever had? A. No.

Q. And, as he testified here yesterday, you have known him a long time?

A. A Number of years.

Mr. Faulkner: I think that is all. You may cross-examine.

(Whereupon, Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; the witness Helen Monsen resumed the witness stand, and the Cross-Examination by Mr. Nesbett was adduced as follows:)

(Testimony of Helen Monsen.)

Q. Mrs. Monsen, I don't think that I will take long in cross-examining you. I will ask the questions as simply [478] as possible. Please take your time in thinking them over before you answer, and, if you do not understand the question, please ask me to repeat it or rephrase it, and I will be glad to do it. A. Thank you.

Q. Now, Mrs. Monsen, referring to the deposition that we took when I came to Juneau on October 10th—— A. Yes.

Q. ——and the telephone conversation that you were discussing in that deposition in response to my question, that is, the telephone conversation that Mr. Small reported that you had had with Mr. Faulkner—— A. Yes.

Q. Now, is it possible that that telephone conversation that Mr. Small mentioned was between you and Mr. Banfield and not between you and Mr. Faulkner?

Mr. Faulkner: Pardon me. Now, just a minute. I object to that question. Mr. Small was asked that quite in detail in his deposition, and he was asked if he was certain of it, and he said yes.

Mr. Nesbett: Your Honor, that is no basis for an objection.

The Court: I feel that is proper cross-examination. Objection overruled.

Q. (By Mr. Nesbett): The question was—would it be possible [479] that that conversation could have taken place, as you admitted in your

(Testimony of Helen Monsen.)

deposition it could have taken place, you didn't remember, between you and Mr. Banfield?

A. No; not the one to which Mr. Small referred; and I never talked over the telephone with Mr. Banfield.

Q. Mr. Banfield was Mr. Faulkner's partner?

A. Yes.

Q. And you have occasion to deal with him on legal matters quite often, do you not, instead of Mr. Faulkner?

A. Most of my dealings are with Mr. Faulkner.

Q. But on occasion you did consult Mr. Banfield, did you not?

Mr. Faulkner: Well, if the Court please, I have further objection to these question as the privilege in a communication between an attorney and client is not admissible in evidence.

Mr. Nesbett: Your Honor, I am not asking for any divulgence.

A. Can I say something?

The Court: Just a moment please.

A. I beg your pardon.

The Court: Just now I heard no such question. If the question is asked as to any further conversations between Mrs. Monsen and her attorney, and the question of privilege is here made, then of course we must invoke that rule. She cannot be asked such further questions without the consent of [480] her counsel.

Mr. Nesbett: Well, your Honor, it says right in the deposition that Mr. Banfield came to the

(Testimony of Helen Monsen.)

office. Do you mean that I cannot even touch on that subject?

The Court: I had not said that. I said cannot——

Mr. Nesbett: Not what was said.

The Court: Yes, that is what I said. The question did not relate to conversation.

Mr. Nesbett: Then the objection is overruled?

The Court: Then the objection is overruled as to that question.

Q. (By Mr. Nesbett): You may answer that, Mrs. Monsen, if you can.

Mr. Faulkner: What was the question, counsel?

The Court: The question was simply, as I understood it, whether Mr. Banfield came to her office That is the question you objected to.

A. He came into the office the next morning. I think Henry was also—also came into the office the next morning.

Mr. Faulkner: Henry who?

A. Pardon me. Mr. Roden. And, I may be wrong, I believe that was at the time Jack Daum got the interview with Mr. Roden.

Q. (By Mr. Nesbett): Well, if you can, Mrs. Monsen, just please be responsive to the questions I ask you. Did [481] Mr. Banfield come to the office the day after the publication?

A. Yes; but not—nothing—it has nothing to do with Mr. Small's deposition. Mr. Small is completely incorrect in everything he says.

Q. Everything?

(Testimony of Helen Monsen.)

A. In everything he says about Mr. Faulkner calling and talking in a loud voice or in calling me at all.

Q. And after Mr. Banfield came to your office the day after this publication, I mean, the day after this publication you then went to see Mr. Faulkner as you testified, didn't you?

A. Then I did go up to see Mr. Faulkner.

Q. And Mr. Faulkner, you testified, told you that he did not consider this publication libelous, did he not? A. Yes.

Q. And why did you have occasion to ask him if it was libelous?

A. Mr. Roden—I am not sure about this. I would like to ask Mr. Roden. Could I do that?

Q. Well, no. Just answer the question, if you can.

A. My memory is that Mr. Roden came into the office, that Mr. Daum interviewed him at that time, that Mr. Roden felt very badly, and I told him that I did, too, and we were trying to figure out something that could be done [482] to explain that, just what Mr. Daum meant in his stories in case the reading public didn't understand. Is that——

Q. Well, no. The question, Mrs. Monsen, was why did you go to see Mr. Faulkner?

A. Because Mr. Daum had written this "Attention" paragraph that is in the paper, and I wanted to ask Mr. Faulkner if that was correct, if that was all right to do.

(Testimony of Helen Monsen.)

Q. Now, you say you felt very badly over Mr. Roden being handled in the publication of the 25th, the way he was?

A. Well, yes. You want yes and no answers? I felt badly about—I don't like to hurt anyone; I am sorry.

Q. You didn't know that that was going to happen to Henry Roden the day that it was published, did you? A. No.

Q. If you had known that that publication was going to be made, you probably wouldn't have done it?

Mr. Faulkner: Just a minute. I object——

The Court: That may be argumentative.

Mr. Faulkner: Yes; I think so.

Mr. Nesbett: I will rephrase it.

Q. (By Mr. Nesbett): If you had known the publication was going to be made in that way, would you have permitted it?

Mr. Faulkner: Now, again, that is argumentative.

The Court: Well, I doubt if that is argumentative. [483] It is not an argument. It is a question. You may answer it.

A. I have told—I think, when I saw you that day, Mr. Faulkner, I told you that one of my difficulties was separating myself from being a newspaper publisher and a——

Q. Mrs. Monsen, to get back to the question——

Mr. Faulkner: Let her answer the question please.

(Testimony of Helen Monsen.)

Mr. Nesbett: She isn't answering. I have a right to ask her to be responsive, Mr. Faulkner.

The Court: That is true.

Q. (By Mr. Nesbett): Do you recall the question, Mrs. Monsen? A. No.

Mr. Nesbett: I wonder if I could have the reporter repeat it?

The Court: Yes. Would you repeat it please, Miss Maynard?

The Reporter: "Q. If you had known the publication was going to be made in that way, would you have permitted it?"

A. That was a long time ago. I don't know what I would have done at the time. There would probably have been an argument, and it is very possible that Jack would have won because he wasn't doing anything—he believed in what he was doing.

Q. (By Mr. Nesbett): Then, your answer is yes, you would have permitted it? [484]

A. I think so; I mean, it would have been over, no doubt over, an argument.

Q. As of that time, Mrs. Monsen, you had been managing the Empire for about ten years, hadn't you, as President of the Corporation?

A. Yes.

Q. And do you mean that you would have permitted a man who had only been with you for thirteen days to dictate to you the——

A. I had known Jack before——

Q. Pardon me. A. Pardon me.

Q. ——the type of publication that was going to be made?

(Testimony of Helen Monsen.)

A. I would have deferred to his judgment. My judgment was frequently that of a woman rather than a publisher, and there is a difference there, as far as I am concerned.

Q. You were entirely familiar with Alaskan politics, particularly around the capital, then, weren't you? A. I presume so.

Q. And Mr. Daum had spent the year preceding that in Washington, D. C., hadn't he? A. Yes.

Q. And would your answer still be the same, that you would have permitted him, after being with you only thirteen days, to make such a publication, if you had known about [485] it?

A. Aren't you repeating your question there? I don't know. I told you the——

The Court: I rather think, counsel, although there is some leniency on cross-examination, that the subject is sufficiently exhausted. She has answered the question.

Mr. Nesbett: There is no objection, your Honor, except from the witness.

The Court: Well, the witness herself; the Court may consider that; that is, if you had not received a responsive answer, then you should be permitted to continue the cross-examination, but, if you have, then the subject should be dropped.

Q. (By Mr. Nesbett): Mrs. Monsen, in your deposition on Page 20 I asked you this question: "Didn't you dictate any policy in general to your—" Then the answer commenced: "In most cases it was not necessary, because most of the people who

(Testimony of Helen Monsen.)

worked on the Empire knew about how I felt about various and sundry things, and I tried to be fair and I tried to publish nothing except what I believed the people had a right to know. That is part of the duty of a newspaper, you know."

Now, it is a fact, isn't it, that all of your employees knew your policy and your attitude toward what, as you termed, Governor Gruening was attempting to do in [486] Alaska?

A. Golly, I would think so.

Q. Well, you say in most cases it was not necessary to dictate policy. Then, I will ask you why was it not necessary to inform your executives and reporters of your attitude as publisher of the paper?

A. Through most of the forties, up until 1948, Bill Carter was running the paper, and much of that time I was in the hospital in Seattle or ill in Seattle and under doctor's orders. I would be in Juneau, oh, for six weeks or so at a time, three or four times a year. I left things to Bill at that time. Bill was aware of what was—can I say—what was going on, more aware than I. Bill Carter, I am referring to. And the policy was as much Bill Carter's policy as it was mine up until that time; that was up until the spring of 1948.

Q. And then after 1948 Mr. Carter left your employ, did he? A. Yes.

Q. And did you inform the—did you hire a new managing editor, or whatever you call it?

A. No. We were limping along. I have forgotten who we had there then. We were—usually I did not

(Testimony of Helen Monsen.)

have to inform the people about what to do.

Mr. Faulkner: What was that last?

The Reporter: "Usually I did not have to inform [487] the people about what to do.

Q. (By Mr. Nesbett): But after 1948, Mrs. Monsen, is it a fact that you informed your new managing editors, as they came, of your general policy of the newspaper with respect to the political atmosphere?

A. I take it you are referring to Mr. McFarland?

Q. No. In general after 1948?

A. Well, who did we have? I have forgotten who was on the Empire in 1949. I think we were operating with the desk man and the business manager and reporters who had all been with us, and they knew what to do.

Q. You read most, if not all, of the editions of your paper that were printed, did you not?

A. Yes.

Q. You knew in general the policy or attitude reflected in the editorials and news reporting published in those editions, didn't you? A. Yes.

Q. And you approved in general those publications and that attitude, didn't you?

A. Not always.

Q. And did you then, when you disapproved, so inform your editors?

A. Sometimes one just lets matters ride, Mr. Nesbett.

(Testimony of Helen Monsen.)

Q. Well, can you answer my question? Did you inform your [488] editors on those occasions when you disapproved?

A. Not always; no. I don't think a woman has any business being a newspaper publisher, and I think anybody who has worked for me will say the same thing. When you have employees, you want to let them run the paper.

Q. Well, I understand your position, but you, as a matter of fact, got the paper from your father and you were sort of saddled with it and then tried to run it and——

A. I felt it was a responsibility, too.

Q. Well, did you ever on any occasion call your managing editor in and inform him of your disapproval of attitudes or policies reflected in editorials or news reports?

A. I suppose I did.

Q. And did you on occasions call them in and compliment them on reflecting the proper attitudes of the Juneau Empire when they had done in your opinion a good job of reporting?

A. I hope I did.

Q. Mrs. Monsen, do you recall this—I am showing you Plaintiffs' Exhibit 6; do you recall this editorial, dated Friday, May 25, 1951, entitled "The Governors' Trip," printed in the Empire?

A. Yes; I guess I do. I don't remember the editorial. I remember the occasion of Governor Warren being in Alaska. You might notice, too, that—that is

(Testimony of Helen Monsen.)

not the Empire. I am not [489] the only one. That is something I object to, as being—just making it personal.

Q. I beg your pardon?

A. This is just being made—you know what I mean.

Q. No, I am not, Mrs. Monsen. I am trying to be as careful as I can. I don't want you to get excited. After all there is a case to be decided, and the jury has a right to——

A. Yes, sir; that is true; and I beg your pardon.

Q. Do you recall the editorial entitled "R. E. (Anything For A Laugh) Sheldon," dated April 15, 1952, also a part of Plaintiff's Exhibit 6?

A. Golly, yes. I read it either—I don't know whether I was in town or not when I read it afterwards.

Q. Did you write it? A. No.

Q. What is the next editorial? I will read it so we can identify it for the record.

A. Oh, I beg your pardon.

Q. An Empire editorial, dated Monday, April 14, 1952, a part of Exhibit 6, entitled "The J-J Clambake." Did you write that editorial?

A. I didn't.

Q. Do you recall reading it in your newspaper?

A. I presume I did. I don't recall. I would be dishonest [490] if I said I did, but I don't. I presume I did.

Q. And then, Mrs. Monsen, the last, the next to the last portion of Exhibit 6, Plaintiffs' Exhibit 6,

(Testimony of Helen Monsen.)

an editorial published Thursday, September 13, 1951, entitled "Another Stab in the Back," do you recall that editorial and did you write it?

A. I didn't write it. I recall it.

Q. And then the last editorial in Exhibit 6, Mrs. Monsen, an Empire editorial, dated September 7, 1951, entitled "Trouble in Paradise," do you recall that editorial and did you write it?

A. I don't recall that I was in town at the time, but I don't know.

Q. Do you recall the editorial itself?

A. No.

Q. You do not? A. No.

Q. Mrs. Monsen, with respect to the editorial entitled "The Governors' Trip" and discussing the visit of Governor Warren of California, did you approve the editorial policy reflected, the publisher's policy reflected, in that editorial with respect to the statements that in effect Governor Warren had been duped by the Gruening machine into making a statement, a speech, in favor of statehood? [491]

A. Does it say he had been duped by the Gruening machine?

Q. In words to that effect, offering "humble apology" that Governor Warren was subjected to that sort of thing.

A. Yes; we had a letter from Fairbanks about the situation. It was very distressing.

Q. Mrs. Monsen, with respect to this particular paragraph of the editorial:

"The Governor of California then unknowingly

(Testimony of Helen Monsen.)

stepped into the trap and in an anti-statehood Fairbanks where he was guest of its University he delivered a speech on statehood that was plainly from the notebook of the statehood committee.

"What was to have been a delightful social affair turned out an embarrassing political rally for statehood and the Governor's fair-haired favorites.

"It was an imposition on the good nature of a greater leader when he was used for such a lowly and purely selfish purpose.

"The rest of Alaska must surely be bowing low in humble apology today for the untoward action of its Governor."

Did you approve that type editorial policy as reflecting the policy of the publisher of the Daily Alaska Empire?

A. It is so difficult to say things without explanations. [492] Yes; I will say that, and try to avoid explanations.

Q. Then the editorial "R. E. (Anything For A Laugh) Sheldon," written on April 15, 1952. Mr. Sheldon was a candidate for the office of Auditor of Alaska at that time, was he not? A. Yes.

Q. And the editorials of the Daily News, that is, the Alaska Daily News, the Times, reflected the policy of the newspaper. Did you approve an editorial being entitled with respect to a candidate and describing that candidate in the words placed in parentheses "(Anything For A Laugh) Sheldon"?

A. Isn't that what Mr. Sheldon was doing at that time?

(Testimony of Helen Monsen.)

Q. Don't ask me, Mrs. Monsen. Answer the question, if you can.

A. Under the circumstances I think that was all right.

Q. Mrs. Monsen, the editorial, a part of Exhibit 6, dated April 14, 1952, entitled "The J-J Clambake," this portion of the editorial I am going to read:

"After the candidates had been heard, the assemblage was treated to a ten-minute talk by Governor Gruening. His Excellency, as he was affectionately addressed, brayed happily about the successes enjoyed by the Truman administration and his own and went on to take a few pot shots at a group of Juneau citizens whose views are [493] apparently at variance with his own."

You didn't write that editorial, did you?

A. No.

Q. Do you approve that sort of attitude?

A. What is the next?

Q. Do you approve that sort of attitude?

A. What is beyond that?

Q. The editorial goes on before and after that. I am only asking you about this particular portion. "His Excellency" and the Governor "brayed happily" and so forth—do you approve that sort of language in description in your editorials?

A. If that is what occurred.

Q. Did you say anything to your editorial staff about having described the Governor of Alaska in that fashion in your columns?

(Testimony of Helen Monsen.)

A. Hadn't he been denouncing other people, other Juneauites in the——

Q. It said, "a few pot shots." Now, can you answer the question? Did you approve that method of describing the acts of the Governor of Alaska?

A. If that was the situation at the time, I presume it was all right. I don't know.

Q. You mean, if His Excellency actually brayed, why, it was all right to say so? [494]

A. I think that that is literary license, if that is literature.

Q. Do you think that is fair comment on a matter concerning the acts of a public official?

A. I think that Governor Gruening probably said things about people in Juneau that——

Q. But try to answer the question, Mrs. Monsen, if you can. Do you think that is fair comment, to describe or reflect your policy in connection with acts of public officials?

A. Well, you can't always be—I told you my difficulty is separating myself from the newspaper, and under that circumstance I think that was all right.

Q. There was another editorial, dated September 13, 1951, entitled "Another Stab in the Back," and that concerns the removal of the Secretary of Alaska, Lew Williams, and in the first paragraph is the expression—the sentence is used: "Ananias was a piker." And it describes the act of the removal as "the latest in the long series of Gruening

(Testimony of Helen Monsen.)

purges," and it goes on to say, "the Governor insists, with wide-eyed innocence, that he 'had nothing to do' with Williams' dismissal. Ananias was a piker." I will ask you whether or not you approved that attitude and—approved that attitude?

A. Yes.

Q. And do you think it is fair comment to compare a high [495] public official with one Ananias?

A. Can I add, by the way, that Ananias is not a character in Greek mythology. I think you will find Ananias in the Bible.

Q. Do you still say you didn't write this editorial?

A. As far as I know, I did not; I don't know.

Q. You might have and then forgotten it?

A. No; I don't think I wrote it.

Q. Did you tell the person who wrote it about Ananias and suggest to him what he should write in the way of an editorial?

A. No. We felt quite strongly about Lew's removal at the time.

Q. Felt quite strongly about what?

A. About the removal of Lew Williams at the time. That is also a privilege of a newspaper, I believe.

Q. Yes. You considered it the privilege of a newspaper to in effect call the Governor a liar in print and as comment simply because he denies having anything to do with a removal which came from Washington, D. C.?

A. He was within his right to say he knew noth-

(Testimony of Helen Monsen.)

ing about it, but we had been told on very good authority that he knew all about it. Now, I may be wrong about that, Governor Gruening, but I believed at the time that it was all part of a plot that had gone on for sometime. [496]

Q. Don't you think it would have been more in line with newspaper ethics and fair play and fair comment to, if you felt that way, in your editorial to say that, although the Governor has denied having anything to do with it, we hold a different opinion for reasons thus and so?

A. It probably would, but on a small town newspaper, sir, one doesn't have time to weigh one's writing. Mr. Daum can verify that.

Q. You have time to weigh the effect and the importance of the words you are using with respect to one of the highest officials of the Territory, even though it might be a small paper, but it is still the capital paper?

A. One should have. We had a very small staff.

Q. Now, after having your attention drawn to those editorials which are part of Exhibit 6, Mrs. Monsen, all of which editorials you say you approved, and the editorials ran from 1951 and into 1952, can you actually state that you did not tell your editors and reporters what your attitude was with respect to a given incident or situation and expect them to reflect your attitude in your publication?

(Testimony of Helen Monsen.)

A. No. They felt the same way I did, I believe, and, in spite, I think these all have to do with officials and acts and policies and so on. They had nothing to do with Governor Gruening personally. [497]

Q. Well, wouldn't it have been just slightly more dignified, if not much more dignified, to, in describing the acts of the Governor of Alaska in the publication, issuing out of the capital of Alaska and circulated all over this Territory and to, as you admit, places all over the United States, including the capital, to describe his talk as a speech and criticize its contents, if you wanted to, rather than say the Governor "brayed"? Now, that is not necessary, insofar as differing with him on his policies, to say he "brayed" rather than he talked?

A. It probably would have been just as effective to say that he talked.

Q. It wouldn't have been as effective to convey the attitude of complete disharmony or dislike on the part of the attitude of the publisher, would it; that is, to say "brayed" instead of talked?

Mr. Faulkner: If the Court please, I think this examination is getting drawn out unduly, and these questions are argumentative.

The Court: I find the last three questions to be unduly argumentative, counsel. They have been answered, but it is suggested that such be avoided.

Mr. Kay: May we confer, Your Honor, for just a moment?

(Testimony of Helen Monsen.)

Mr. Nesbett: In view of Mrs. Monsen's feelings, [498] Your Honor, and the long day we have had in Court, Mr. Faulkner and I agree that, if it is acceptable to Your Honor, we could recess now——

The Court: Very well.

Mr. Nesbett: ——and reconvene in the morning at any time your Honor suggests.

The Court: Very well. You do not wish to conclude your cross-examination now, at this time?

Mr. Nesbett: No.

The Court: Very well.

(Whereupon, the jury was duly admonished, and the trial was adjourned until 10:00 o'clock a.m., November 18, 1955, and resumed as per adjournment, with all parties present as heretofore and the jury all present in the box; whereupon, the trial proceeded as follows:)

The Court: At the recess last evening you were not finished with your cross-examination, Mr. Nesbett?

Mr. Nesbett: No, sir.

The Court: Mrs. Monsen, then, may resume the stand for further cross-examination.

(Whereupon, the witness Helen Monsen, resumed the witness stand, and the cross-examination by Mr. Nesbett was continued as follows:)

(Testimony of Helen Monsen.)

Q. Mrs. Monsen, I will show you a photostat of an editorial appearing in the Juneau Empire, Saturday, March 15, 1952, [499] entitled "The Return of 'Alibi Ernie' ", and ask you if you wrote that, or if you recall it.

A. I didn't write it. I think you will find that I was out of town at that time, if you want to look it up.

Q. You were out of town at that time?

A. Yes.

Q. You recall the editorial, do you not?

A. No, I don't.

Q. You mean, you have never read it?

A. Not that I know of.

Q. Would it refresh your memory if I read the first paragraph: "On his return from Washington, Alaska's parttime Governor was ready with the usual alibis for the latest failure of the statehood bill." Do you recall that? A. No.

Q. I will show you a photostat, Mrs. Monsen, of an editorial appearing in the Daily Alaska Empire on July 9, 1952, entitled "The Artful Dodger," carrying on: "Agile Ernie, the artful dodger, again managed to sidestep comment on the notorious Palmer Airport deal" and so forth. Did you write that editorial, or do you recall it?

A. I did not write the editorial.

Q. Do you recall, or did you write, an editorial appearing in the Daily Alaska Empire on September 11, 1952, entitled [500] "And Pays, and Pays, and Pays." "Alaska's footloose Governor, probably

(Testimony of Helen Monsen.)

the most traveled man ever to sign an expense voucher, will take off again this week for a junket across the Territory." Do you recall that editorial, or did you write it? A. I didn't write it.

Q. Do you recall that editorial appearing—that would be a matter of two weeks prior to your publication of the issue of September 25th?

A. I may not even have read it. I was in Juneau at the time. That was the week of the "Kathleen" wreck, and we were doing a lot of very hard, earnest reporting on the "Kathleen" at that time.

Q. Somebody spent some hard, earnest time on that editorial, and I was wondering——

A. No; they probably didn't. They probably dashed that off in a very short time, and it was not I that did it.

Q. A matter of a few minutes?

A. I would think so.

Mr. Nesbett: Your Honor, I would like to introduce this in evidence (handing proposed exhibit to defendant's attorney.)

The Court: Is there any objection?

Mr. Nesbett: No objection, Your Honor.

The Court: The editorial offered may be admitted [501] in evidence, that is, the photostatic copy.

The Clerk: Plaintiff's Exhibit No. 12.

Mr. Nesbett: The editorial is rather short, Your Honor, and I will read it. Thursday, September 11, 1952, of an editorial in the Daily Alaska Empire, entitled in large print "And Pays, and Pays, and Pays."

(Testimony of Helen Monsen.)

"Alaska's footloose Governor, probably the most traveled man ever to sign an expense voucher, will take off again this week for a junket across the Territory.

"Depending on flying weather, the Gubernatorial tourist will fly to Haines, then proceed by auto over the highways. He said yesterday he hankers to test some of the road improvements made during the past few years.

"Sometime during his tax-supported tour, he is scheduled to speak before a science conference at Mt. McKinley.

"As subject for his talk, we suggest he use the title of his own book: 'The Public Pays.'"

Beneath the editorial, slightly separated from it, but directly underneath, is the one sentence: "If you are ever in doubt, about saying something, don't say it."

Directly below that squib or remark is another one which reads as follows: "No one can be as sure of his opinions as the thoroughly ignorant."

Now, would that editorial and the comments appearing directly beneath it, in your opinion, be fair comment upon the [502] official acts of the Governor of the Territory?

A. I think the lines beneath it had nothing to do with the editorial.

Q. (By Mr. Nesbett): The editorial itself, Mrs. Monsen, would you answer the question in that respect? Do you consider that to be fair comment by

(Testimony of Helen Monsen.)

the newspaper on the official acts of the Governor?

Mr. Faulkner: If the Court please, I don't think the question of fair comment would apply on an editorial. An editorial is either privileged or not. But fair comment, I think, is comment on the facts published.

The Court: Fair comment certainly applies to editorial matter as well as news. As a matter of fact, the Court would hold it would be more so. The objection is overruled.

Q. (By Mr. Nesbett): Will you answer that question?

A. I think under the circumstances that it probably does.

Q. That it probably is fair comment?

A. Yes.

Q. And represents the attitude of the Daily Alaska Empire toward the Governor and his administration?

A. Towards his administration.

Q. Mrs. Monsen, considering that editorial and the other two that I mentioned to you this morning, in conection with the other editorials that I presented to you [503] yesterday afternoon, can you state that those editorials represent, generally, the attitude of the Daily Alaska Empire toward the Governor and his administration?

A. Generally, I presume, as far as I can see, it is the duty of a newspaper to call attention to circumstances to which it objects.

Q. Do you—rather, I will ask you this question,

(Testimony of Helen Monsen.)

Mrs. Monsen. On direct examination by Mr. Faulkner I believe you testified, did you not, that you had sold the Daily Alaska Empire? A. Yes.

Q. And what price did you sell the Empire for?

Mr. Faulkner: Well, if the Court please, I think that that is immaterial and objectionable. I object to it. It has no bearing on this case. What she sold it for has nothing to do with the case. We would have to go into the matter of debts and mortgages and all that sort of thing, and it is collateral to all the evidence.

The Court: I can't see any relevancy, counsel, to any such inquiry.

Mr. Nesbett: Well, Your Honor, then may I ask that the jury be excused and present my authorities? I am convinced, and have done it many, many times, that we have every right in the world to present evidence of the financial status of the defendant, in this case a corporation. With respect to [504] Mrs. Monsen, I have no desire whatsoever to pry into her private, personal affairs. She is not a defendant. I have every right under the law to present evidence of the financial status of the defendant corporation, the Empire Printing Company.

The Court: The Court had intended to instruct the jury that they must completely disregard any matters concerning the financial status of either party in determining the issues of this case. If we are in error in that, I should like to hear from you, sir.

(Testimony of Helen Monsen.)

Mr. Nesbett: Very well, Your Honor. I would certainly like to be heard.

The Court: The jury may be excused while we discuss this matter.

(Whereupon, the jury retired from the courtroom.)

The Court: You may step down then, Mrs. Monsen, unless you are just as comfortable there. Are you?

Mrs. Monsen: It is just as comfortable.

Mr. Nesbett: May I have a moment, Your Honor. My files have grown so large it will take a moment to find it. Your Honor, in my research and in trying cases of a similar type, slander and libel, the evidence has always been admitted in the Alaska courts.

However, I have in my notes here certain cases, that I found in research, holding to this effect—the majority of [505] the courts hold that such evidence, referring to evidence of the financial status of the defendant, is admissible to show the weight and credence to be given to the defendant's utterances, and, most important, is relevant in assessing damages, especially if punitive damages are asked for. In that case the United States Supreme Court passed upon the exact situation, in the case of Washington Gas Light Co. v. Lansden, 172 U. S. 534.

And in a case quite similar to this one, decided by the Supreme Court of California, and, incidentally, a libel case which is cited throughout the authorities because it covers so many various points,

(Testimony of Helen Monsen.)

entitled Scott v. Times Mirror Publishing Co., Supreme Court of California, reported in 184 Pacific 672; there is an annotation covering this point in 34 A.L.R., commencing at Page 8; briefed, that annotation is to this effect—the majority of cases seem to hold that the financial condition of the defendant is material "upon the theory that in all malicious torts where, in addition to the compensatory damages given to make whole the plaintiff's injury, 'added damages' are allowed by way of punishment to the defendant for his wilful conduct, and as an example to others to refrain from such acts, the amount of added damages must bear a ratio to the resources of the person punished in order to effect the purpose of such damages." And citing the Scott v. Times Mirror case, a United States Supreme Court [506] case and—I have counted them, Your Honor—twenty-one other state courts, all holding to that effect, citing the only contrary state court as being the Supreme Court of Michigan.

Now, Your Honor, Mr. Faulkner in his direct examination touched on the point of the sale of the Empire Corporation, the number of shares of stock held by Mrs. Monsen with respect to the number held by her sister, Mrs. Lingo, and mentioned the one share held by Mr. Faulkner or which was held.

I have every confidence that we have every right under the authorities, Your Honor, to present this evidence and, as I say, I have done it many times myself, and it has always been accepted by the courts.

(Testimony of Helen Monsen.)

Mr. Faulkner: If the Court please——

The Court: Well, in any event, counsel, would it be proper cross-examination? Would it not be a part of your case in chief, or at least in rebuttal, to call this witness on your own behalf?

Mr. Nesbett: I discussed that with Mr. Kay last night, and it seems hardly important. If Your Honor will permit—I don't know what you would do in a case like this—I could call the witness as my own for that purpose only or—it is properly, however, part of the cross-examination. Mr. Faulkner brought in the fact that the corporation had been sold and the number of shares. Am I not permitted to inquire [507] on that point?

The Court: That is true.

Mr. Kay: Your Honor, I had something to add. We discussed calling Mrs. Monsen or Mr. Allen as to the purchase price and the value of the property, but it seemed that rather than expose yourself to the risks which may occur in the trial of a lawsuit by calling an adverse witness that it would be proper, because we had anticipated that at least some opportunity would be offered by the direct examination, to present this evidence as proper cross-examination. However, if there is a feeling that it is not proper cross-examination, then in that event we would ask leave of the Court to reopen our case in chief for the very limited purpose of making Mrs. Monsen our witness for a few minutes to bring out the details of the financial transaction. I think we are entitled to the evidence.

(Testimony of Helen Monsen.)

Mr. Faulkner: Now, if the Court please, I don't think that that is so, because I have heard the authorities read by counsel here, but I don't think the Court can be very well informed on what the law is by somebody reading the syllabus of a case. I think you should examine the case and the nature and the circumstances under which that might be permitted. I know that in general it is not permitted. I know that one of these cases is Scott v. Times Mirror Publishing Company, 184 Pacific. Now, that is a California case [508] that I have seen. I don't recall just what is in it. But the Court will notice it is quite an old case, and the Supreme Court of California has flatly reversed itself—now, I don't know whether in this particular—but generally on the question of libel, and gone back to the case of Coleman v. MacLennan, as the Court of Appeals for the Ninth Circuit said last December. And the case of Schy v. Hearst Publishing Company is a recent case. The one they cited here is an old one, and, as I say, I don't know—I was wholly unprepared for this. But I think the Court can see where a thing like that could lead.

Now, I don't know what counsel's purpose could be, whether it is to show the jury that the defendant could pay a judgment over $400,000.00 or not; I don't know. That would be quite simple to show that it couldn't pay it, but to go into a thing like that—Mrs. Monsen has said that she sold the Empire, selling it on contract. We haven't the contract here.

(Testimony of Helen Monsen.)

Mr. Nesbett: Yes, we have a certified copy right here.

Mr. Faulkner: Well, all right. Now——

The Court: I do not think that she testified that she sold it on contract, but, if that is admitted—I think she just said that she had sold it to Mr. Allen.

Mr. Faulkner: That is right. Counsel knows how she sold it. And to attempt to go into the question of the purchase price wouldn't have anything to do with this, as to [509] what assets the defendant might have, because that would depend upon liabilities and mortgages and notes and indebtedness and various things that would take us a long time to go into, and, certainly, I would not want Mrs. Monsen asked those questions suddenly from the witness stand without an opportunity to reflect on it and to refresh her memory. She hasn't got the material. She doesn't even have a copy of the contract here. Counsel for plaintiffs have.

I think it is a thing that is highly immaterial in a case of this nature, and, as I say. I never examined any of those authorities, but I think that you will find that there are some circumstances in those cases which are not present in this case, and I would like to see some more up-to-date authorities from the Supreme Court of California, which decisions we must follow according to our Court of Appeals.

(Testimony of Helen Monsen.)

The Court: Well, counsel, we would not undertake to determine this point without a review of the authorities cited on the question. It is new to me. If this be the rule, it is certainly an exception to the ordinary rule in Court cases in which the question of the financial responsibility of the parties against whom damages are sought might be not only irrelevant but might be prejudicial. I would not care to pass upon it without careful review of these authorities.

Mr. Faulkner: Well, I think, Your Honor——

Mr. Nesbett: I think it is my turn to be heard, Your Honor.

The Court: Very well.

Mr. Nesbett: I will stand on the authorities and follow any method Your Honor suggests so that we can present to Your Honor a clear picture of the argument in favor of one side or the other and let Your Honor pass on it.

Mr. Faulkner: Well, what I was going to say, Your Honor, is that I think the reason courts don't admit that kind of evidence is it might—it would more likely be highly prejudicial to a plaintiff because, if that has a bearing on the case, most any defendant could come in court and minimize what they have.

The Court: Well, of course, the plaintiff waives that if they offer it in evidence.

Mr. Faulkner: Well, I think they do.

Mr. Nesbett: It is immaterial.

(Testimony of Helen Monsen.)

Mr. Faulkner: I think that is the rule on it and I don't think that that is admissible at all.

Mr. Kay: May I cite just 33 American Jurisprudence, Section 284, Your Honor. That contains——

The Court: 284?

Mr. Kay: Section 284 of Libel and Slander—contains apparently all of the authorities or at least those available, and I know that there has been no change apparently in the [511] Pocket Part, '55 Cumulative Supplement, in the language of the text. I haven't examined it in these cases, as Mr. Nesbett has, but the language of the text would certainly support the position taken by the plaintiffs.

The Court: Well, frankly, I am not prepared to rule upon this matter at this time. It is new to me. Therefore, what we shall do is this—for the time being—well, we will not even decide it. We will reserve decision upon the question, but for the present, at least, until decision is made, the objection of the defendant will be sustained with the right of the plaintiffs to renew the question at a later time either by calling Mrs. Monsen as their own witness in rebuttal, which I think may be done, or by further cross-examination if desired. We will try and determine that, if possible, during the noon recess.

Mr. Nesbett: Your Honor, I have no other questions to ask, so, if you sustain the objection subject to my right to renew—what does Your Honor

(Testimony of Helen Monsen.)

want me to do—present the cases with markers in them to you?

The Court: Well, if you have any further authorities. I have noted those cited.

Mr. Nesbett: I have none now, but the annotation in A.L.R. would give you every state.

The Court: Yes. Well, I will examine that carefully. [512]

Mr. Nesbett: Well, you say with the right to renew the question on cross-examination?

The Court: I said either on cross-examination or further cross-examination or in rebuttal, if you so desire. That is, I do think, by reason of the fact that Mrs. Monsen did testify having sold the paper, that it may be proper cross-examination; that is, it may have sufficient relation to her testimony in chief; but, certainly, she can be later recalled for further cross-examination if we determine you have a right to go into that.

Mr. Nesbett: Very well.

The Court: Call in the jury then.

(Whereupon, the jury returned and all took their places in the jury box.)

The Court: For the benefit of the jury, the Court is obliged to reserve decision upon the question of the relevancy of the question last asked of the witness Mrs. Monsen, and for the present at least the objection is sustained with the right reserved to plaintiffs to renew the question when we are able to do a little research on the matter and finally determine the question.

(Testimony of Helen Monsen.)

Do you have any further questions?

Mr. Nesbett: No, Your Honor.

The Court: Do you have any redirect?

Mr. Faulkner: Yes, Your Honor. [513]

Redirect Examination

By Mr. Faulkner:

Q. Mrs. Monsen, Mr. Nesbett introduced an editorial here, and read it to the jury here this morning, which was dated November 11, 1952, and I think you said in answer to his question that that was during the week of the "Princess Kathleen" wreck? A. I thought it was September.

Q. What was that date?

A. I thought it was September.

Q. September 11, 1952. Now, do you recall when the "Princess Kathleen" was wrecked?

A. The Sunday before that, I believe.

Q. The Sunday before September 11th?

A. I think so.

Q. This editorial was dated September 11, 1952, and the article complained of in the paper was dated September 25, 1952? A. Yes.

Q. Do you think the "Princess Kathleen" wreck was during that week?

A. I think it was the Sunday before September 11th.

Q. Are you sure of that?

A. I am pretty sure; yes. It is by special incidents that one usually remembers occasions. [514]

Q. Now, Mrs. Monsen, you were asked some questions about the editorials which are somewhat

(Testimony of Helen Monsen.)

critical of Governor Gruening, and I think you gave some statements yesterday regarding things that you disagreed about and when it was. Do you recall any other matter along in the forties where you had to take issue with the Governor, where the paper did?

A. Oh, golly, there were many times. One was, I think it was, in 1947, that a bill had passed both houses of the Legislature asking that board meetings be open meetings, that any meetings that had to do with the public, feeling of the public, be open meetings, and that the press be allowed to be present, and I believe that passed both houses; it was introduced, I think, by Mr. Johnson of Fairbanks; and it was vetoed by Governor Gruening.

Q. Now, in connection with that, was that bill sponsored by most of the newspapers?

A. By most of the newspapers and by the Associated Press.

Q. And you took issue on that? A. Yes.

Q. The veto of that bill? A. Yes.

Mr. Faulkner: I think that is all.

The Court: Any recross-examination?

Mr. Nesbett: No recross, Your Honor. We only [515] reserve our right on that particular matter.

The Court: Yes. That will be all then, Mrs. Monsen.

(Witness excused.)

JACK D. DAUM

recalled as a witness on behalf of the defendant, having previously been duly sworn, testified as follows:

Direct Examination

By Mr. Faulkner:

Q. Mr. Daum, I will hand you Plaintiffs' Exhibit 1, and I want to ask you another question about that. You said yesterday that the articles on the front page had been set up or—I don't know just how you put it—the night before. What did you say about that?

A. Yes; I said the front page had been dummied the night before.

Q. Dummied. Now, does that mean the entire front page?

A. When you dummy a front page, you dummy your main stories in, and, ordinarily, you don't dummy beneath the fold, and your top stories go in, and then you fill in with these small fillers. The shop man, the floor man, the printer, if the stories that you dummy in don't fit exactly the columns, they will fill in with the little fillers themselves, so you don't dummy those things in. I did dummy in a space for the weather report. You just dummy that in, and they leave a hole for it. Then you [516] pick the weather report up the following day and have it set in type, and they put it in where you have left the hole.

But there is one story here that occurred the following day. It is a fire that occurred in Juneau

(Testimony of Jack D. Daum.)

around noon of the day of publication, and Mrs. Pegues brought that story in around noon, so I pulled out the story that I had dummied in there, because it is a good, you might call it, literally, a hot story.

Q. You mean, the fire was?

A. Yes, sir. And I pulled the story out that I had in there and stuck this local story in to get it on Page 1. But I wanted to explain that that is how the story that occurred that same day of publication got on this front page even though the page itself was dummied the night before.

Q. All the remainder was dummied the night before? A. Yes, sir.

Mr. Faulkner: I think that is all.

Mr. Kay: No questions.

(Witness excused.)

Mr. Faulkner: I want to introduce—this is very brief—the deposition of Minnie Coughlin, which is on file here and was taken pursuant to notice. You have no objection to that? [517]

Mr. Nesbett: No objection.

The Court: If it was taken pursuant to notice, why, it may be admitted.

Mr. Faulkner: To twice as much notice as the law requires, I think. I will read the deposition. It is very brief.

"Pursuant to a notice dated October 27, 1955, and signed by H. L. Faulkner, of attorneys for defendant, and served on the plaintiffs and on plaintiffs'

attorneys, the deposition of Mrs. Minnie Coughlin was taken before Patricia L. Wood, Notary Public in and for the Territory of Alaska, at the offices of Faulkner, Banfield & Boochever, 110 Seward Street, Juneau, Alaska, November 3, 1955, at the hour of 5:00 o'clock p.m."

(Whereupon, the deposition of Mrs. Minnie Coughlin was read as follows—by Mr. Faulkner:)

MRS. MINNIE COUGHLIN

called as a witness on behalf of defendant in the above-entitled action, being first duly sworn upon oath, deposes as follows:

By Mr. Faulkner:

Q. Will you please state your name?

A. The way it is spelled legally is Minnie Coughlin.

Q. That is M-i-n-n-i-e? A. Yes. [518]

Q. And you are the widow of Robert E. Coughlin? A. Yes.

Q. Of Juneau? A. Yes.

Q. And he was the former purser of the Ferry Chilkoot? A. Well, he was also manager.

Q. Yes; manager and purser? A. Yes.

Q. During the years 1951 and '52?

(Deposition of Mrs. Minnie Coughlin.)

A. Well, I know he was in 1952. I don't know when he started.

Q. Now, Mrs. Coughlin, when did he die?

A. September 22, 1955.

Q. And who is the administratrix of his estate?

A. I am.

Q. Now, as executrix or his widow, do you have in your possession his personal effects and property? A. Yes, I do.

Q. Have you made a search to see if you have in your possession, as executrix or his widow, any cancelled checks of the Chilkoot Ferry account for the years 1951 and 1952?

A. I have searched and I have not been able to find any.

Q. I think that is all.

(Reading concluded.)

Mr. Faulkner: Signed "Minnie Coughlin," with the [519] Notary's certificate.

STEVE HOMER

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Faulkner:

Q. Mr. Homer, will you please state your name?

A. Steve Homer.

Q. And where do you live, Mr. Homer?

A. I live in Seattle now.

(Testimony of Steve Homer.)

Q. What are you doing now?

A. I am a student at the University of Washington.

Q. And did you live in Alaska at one time?

A. I lived here for seven years, from 1947 until 1954.

Q. Where? A. At Haines.

Q. Mr. Homer, are you acquainted with the boat Chilkoot that was operated as a ferry between Juneau and Haines? A. Yes, I am.

Q. Did you own that boat? A. I did.

Q. And what became of it? How was it disposed of?

A. Well, in 1951 I sold the boat to a corporation, the Chilkoot Motor Ship Lines, and of which I was one of the stockholders, and then in—about six months later we [520] sold it to the Territory.

Q. In 1951? A. That was in 1951; yes.

Q. And before it was sold to the Territory did you operate it as a ferry between Juneau and Haines? A. Yes, we did.

Q. Are you acquainted with Mr. Robert E. Coughlin who was purser on that boat in 1951 and 1952? A. Yes, I am.

Q. Were you employed on the boat either of those years?

A. I was employed on the Chilkoot as mate in 1952.

Q. 1952? A. Yes.

Q. Did you have any other employment in connection with the Chilkoot in 1952?

A. Well, I continued as agent, as the Haines

(Testimony of Steve Homer.)

agent, for the ferry in 1952, and it started in 1951 with the acquisition of the ferry by the Territory.

Q. Now, in acting as agent what did you do with reference to the collection of freight and passenger money?

A. Well, the agency was to sell passenger space and freight space to whoever desired to travel on the ferry, and we made up manifests and passenger lists and turned them over to Mr. Coughlin, the purser.

Q. Now, at this same time did you act as mate on the boat? [521] A. During 1952; yes.

Q. And for how long a period—I mean, when were your services terminated?

A. Well, I started to work on the ferry on April 5, 1952, and I was discharged on August 20th.

Q. 1952? A. 1952; yes.

Q. Now, in the collection of accounts, freight and passenger money, I will ask you how you transmitted that money to the Chilkoot ferry?

A. Well, for each trip we prepared a passenger list and a freight manifest, and I delivered those to Mr. Coughlin, who was the purser on the ship, with a covering check for the amount that was due, less my own commissions.

Q. You gave him a check; you mean, your own personal check?

A. Yes. A check on my agency account.

Q. Your agency account. Where was that kept?

A. That was kept in the First National Bank of Juneau.

(Testimony of Steve Homer.)

Q. I will ask you if you have the cancelled checks that you issued to the Chilkoot Ferry from —during the summer of 1952?

Mr. Nesbett: Your Honor, I wonder if the Court would ask Mr. Faulkner what he intends to prove or how he intends to connect this testimony up with anything relevant to the issues. I have no particular objection to it except [522] that it is time-killing. I, therefore, object to it.

The Court: I would like to be informed, counsel, as to what the relevancy of any check given by this agent to the purser would have in relation to this libel suit.

Mr. Faulkner: If the Court please——

Mr. Nesbett: Your Honor——

The Court: Just a moment. May he answer the question?

Mr. Nesbett: Well, Your Honor, I just want to be heard. Possibly—I don't know what he is going to say—maybe it is another speech for the benefit of the jury, and possibly it should be out of the hearing of the jury.

The Court: An offer of proof may be made in the presence of the jury as long as we do not argue the facts.

Mr. Kay: Your Honor, usually it is at the bench, is it not, because the offer of proof may not be accepted and may never come to the attention of the jury? At least I have always made offers of proof at the bench.

(Testimony of Steve Homer.)

Mr. Faulkner: Well, I am willing to do it anywhere.

The Court: You may make such offer then. Approach the bench, if you will.

Mr. Faulkner: It is in the normal course of the examination.

(Whereupon, respective counsel and the Court reporter approached the bench, out of the hearing of the jury, and the [523] following occurred:)

Mr. Faulkner: I will state—this case concerns the funds of the Chilkoot Ferry and the way they were handled. The purpose of offering these checks is to show that, to show that Mr. Homer was the agent and that he collected revenue and transmitted that revenue to the Chilkoot Ferry, to Mr. Coughlin, as purser, and to show the disposition of the checks. Now, I will state to the Court, that is, the first list of checks I have here will show by their endorsement that they went into the special ferry account which is the subject of this suit.

The Court: Is there any dispute——

Mr. Faulkner: Just a minute, Your Honor. I haven't finished. Then we propose to introduce some other checks that did not get into the special ferry account, didn't get into the public funds at all. I want to show the method, the endorsements on them, and they are issued by Mr. Homer.

The Court: Do you propose to show anyone connected with the Juneau Empire knew anything about it?

(Testimony of Steve Homer.)

Mr. Faulkner: No. I don't think I have to.

The Court: I think you have to.

Mr. Kay: Do you intend to show one penny did not eventually go into Territorial possession?

Mr. Faulkner: I do.

Mr. Kay: How? [524]

Mr. Faulkner: By showing——

Mr. Kay: Let's say he issued a check to Bobby Coughlin and it was cashed at a grocery store. Does that demonstrate what was done? No; not one iota.

Mr. Faulkner: Coupled with Mr. Ehrendreich's audit——

Mr. Kay: It shows it was accounted for.

Mr. Faulkner: No, it doesn't.

The Court: I cannot see where either the audit or this offer of proof has any bearing upon the truth or falsity of this alleged libel, and that is the issue we are trying here.

Mr. Faulkner: It is the very heart of the case, Your Honor.

The Court: There is no allegation or charge in the publication regarding any shortage that I am able to find. The charge is that these men wrongfully or illegally disbursed funds without putting them through the treasury. Anything that Coughlin did with regard to the money or this audit is wholly irrelevant.

Mr. Faulkner: I would have to take exception to that because it is the heart of the case.

The Court: It has nothing to do with the case as far as I can see.

(Testimony of Steve Homer.)

Mr. Kay: Nothing.

Mr. Faulkner: I will make a further statement. [525] This connection of the plaintiffs with public funds——

The Court: Well——

Mr. Faulkner: A statement for the record. The purpose is to show that the plaintiffs entrusted public funds to an unauthorized person without a bond and that a considerable portion of those funds were lost to the Territory.

The Court: We are not trying these parties either on any civil or criminal action for unlawful —well—or for failure to account for these funds. The issue here is solely whether this publication is true or false, and this evidence can have no possible bearing on it because nothing is suggested in the editorials or articles regarding a shortage of funds. There is no such charge.

Mr. Faulkner: My understanding of the law from the Restatement of the Law, which I can cite to Your Honor, is that, where an official or anyone else entrusts funds illegally, unlawfully, to another person and where they are lost and embezzled, he is criminally and civilly libel.

Mr. Nesbett: That has no bearing on the issues raised in the pleadings.

The Court: Precisely.

Mr. Faulkner: But——

The Court: In any event, it has no bearing on this case, no bearing whatever. We must confine

(Testimony of Steve Homer.)

the issues to the publication, whether it is true or false. That is all we are [526] concerned with.

Mr. Faulkner: I further offer—I state this because—I might as well state it now—I further offer to prove by Mr. Homer that there were illegal payments made out of this fund; that there was payment to aliens, which is contrary to the Territorial law; that there were advances claimed to have been made in wages which were not made; and that there was a very considerable loss of public funds; and their connection with the plaintiffs is that they expressly authorized the handling of the funds by Mr. Coughlin and that they are responsible for his acts. Mr. Roden stated, and as the proof shows, he was their agent.

The Court: That may be permissible except for this fundamental fact, counsel, and that is this publication charges these plaintiffs with commission of a crime, and that we cannot deny. Even if what you say is true, there would be no criminal liability of the members of the Board for such acts unless it be shown that they were accessories to it, and there is no such charge in the publication. We cannot go into something which is wholly collateral. There is no action against plaintiffs for diversion of funds.

Mr. Faulkner: They brought the action themselves on the article which refers to diversion of funds, diversion of funds out of the normal channel provided by law into an unauthorized person's hands who lost the funds. [527]

(Testimony of Steve Homer.)

Mr. Nesbett: There is nothing about lost funds.

The Court: There is nothing whatever in the published publication inferring or in any way mentioning any loss of funds.

Mr. Kay: That is right.

The Court: Therefore, it is not in issue in this case.

Mr. Faulkner: That is true, but the law is that the truth of the facts whenever and wherever discovered are admissible as a defense.

The Court: Such issue would have no relation to the truth or falsity of the libel—nothing.

Mr. Faulkner: Well, I don't think I can ask Mr. Homer any questions under the ruling of the court, and again, I would have to except to Your Honor's ruling.

(Whereupon, respective counsel and the Court reporter withdrew from the bench and were again within hearing of the jury, and the trial proceeded as follows:)

The Court: The objection of the plaintiffs to the last question to the witness Homer will be sustained, and the offer of proof made by counsel is denied on the grounds that it is not relevant to the issues of this case.

Mr. Faulkner: I just wonder if in connection with the offer I shouldn't offer the exhibits I was going to offer through Mr. Homer. [528]

The Court: If you wish.

(Testimony of Steve Homer.)

Mr. Faulkner: I think perhaps I better have the reporter come up——

The Court: Well, that could make no difference. You may offer them. It would not be necessary to identify them. Your offer is denied for the reasons stated, because it would be irrelevant, so, whether it is sufficiently identified or not, it makes no difference because they are irrelevant.

Mr. Faulkner: I think I stated in the objection —I mean, in the offer—what we intended to prove by these checks.

The Court: Yes; that is understood.

Mr. Faulkner: If that is understood, it is all right.

(Whereupon, Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; the witness Steve Homer resumed the witness stand, and the Direct Examination by Mr. Faulkner was continued as follows:)

Q. Mr. Homer, there have been—there has been some testimony here about a check that was issued to you for $398.04 on B. M. Behrends Bank, signed by Robert E. Coughlin—"Chilkoot Ferry, Robert E. Coughlin." I will ask you if the check I hand you is the original of that check?

A. Yes, it is. [529]

Q. And what was the purpose of that check? What was it for?

(Testimony of Steve Homer.)

A. This check was for the payment of overtime that was due me through the entire period of the summer.

Q. And the check shows the date it was issued?

A. It does.

Q. The original check? A. It does.

Q. And does it show what happened to it—I mean, with reference to payment through the Behrends Bank?

A. There is a notation on there that—by Mr. Dunn who is—I don't know his capacity; he is an officer in the bank—that he made on the check, when I presented it, that the account had been closed.

Mr. Faulkner: You have seen this?

Mr. Nesbett: No; I haven't seen the original.

Q. (By Mr. Faulkner): Mr. Homer, the check, you say, has a notation by Mr. Dunn of B. M. Behrends Bank that the account was closed and the "balance transferred as per authorization." Now, when did you present this check to the bank?

A. I believe it was about the 26th or 27th of August.

Q. The 26th or 27th of August. And that is the notation the bank put on the check? A. Yes.

Mr. Faulkner: We will offer this check in evidence [530] as Defendant's Exhibit.

The Court: It may be admitted.

The Clerk: Defendant's Exhibit N.

Mr. Faulkner: Now, if the Court please, I want to ask the witness another question about some other checks, but I think that it is no more than fair

(Testimony of Steve Homer.)

that we should take this up with the Court first and state the purpose of it.

The Court: Very well.

Mr. Faulkner: These are different checks from the ones I had before.

(Whereupon, respective counsel and the Court reporter approached the bench, out of the hearing of the jury, and the following occurred:)

Mr. Faulkner: The defendant offers now through this witness a series of checks issued by him as agent of the Chilkoot Ferry, dated in August, 1952, payable to the Chilkoot Ferry, on the First National Bank of Juneau, in the sum of something over two thousand dollars, which did not go through any Chilkoot Ferry account at the B. M. Behrends Bank.

Now, the Court's former ruling might be considered to cover this, but I offer these checks at this time to refute the statement of Mr. Roden that they continued to operate under this Chilkoot Ferry fund after Mr. Homer's check was presented at the bank and refused and after Neil Moore closed the account. Mr. Roden said they continued. [531]

The Court: Can't that be shown without the checks?

Mr. Faulkner: These checks show they didn't get into B. M. Behrends Bank at all.

The Court: You can rebut the testimony of Mr. Roden as to whether the ferry was operated after this date——

(Testimony of Steve Homer.)

Mr. Faulkner: He said it was.

The Court: These can be offered only for the purpose previously indicated. Attempting to show Mr. Coughlin did not account for all money turned over to him, that we find is wholly irrelevant here for the reason that nothing was suggested in the publication on which the suit was based, regarding shortage of funds.

Mr. Faulkner: These are offered, in addition to the reasons for which I attempted to offer the other checks, to refute Mr. Roden's statement that the ferry fund at B. M. Behrends Bank was continued and not closed on August 25, 1952.

The Court: These checks can have no bearing on such proof. It may be shown without the introduction of the checks in August.

Mr. Faulkner: One witness testifies that the account was closed, and another, for plaintiff, testifies it was not.

The Court: Closed after the date of this publication. These checks are previous dates.

Mr. Faulkner: No; closed before a month before, closed a month before. [532]

The Court: Yes. Excuse me. Supposed to be closed on instructions from Auditor Moore and John Dimond; but it was surely prior to August, 1952.

Mr. Faulkner: No. It was August 25, 1952. Those checks show they were cashed September 4th, I think, on the back of it.

(Testimony of Steve Homer.)

Mr. Nesbett: What purpose they can show, I can't conceive.

Mr. Faulkner: To contradict Mr. Roden that——

The Court: I can't see where the offer of the checks, showing they were paid September 4th, has anything to do with the contradiction of Mr. Roden's testimony. They can be offered only on the issue of whether Mr. Coughlin had a shortage of funds, and that is not in issue here.

Mr. Faulkner: We take exception, Your Honor.

(Whereupon, respective counsel and the Court reporter withdrew from the bench and were again within hearing of the jury, and the trial proceeded as follows:)

Mr. Faulkner: I think that is all, Mr. Homer.

Mr. Kay: May we have just a moment?

Mr. Nesbett: No questions.

The Court: That will be all then, Mr. Homer.

(Witness excused.)

Mr. Faulkner: If the Court please, I think that concludes our testimony, but I would like some time to confer [533] with Mrs. Monsen regarding the matter that the Court has under advisement. That will take a little time because she is here without any records, and this comes on suddenly, and she will have to go through her—whatever files she has, and she doesn't have any. We don't have a copy of the contract with us. Counsel has.

Mr. Kay: May I suggest this, your Honor, that

it is now nearly 11:30; we could lend Mr. Faulkner, and be glad to do so, our copy of the contract; and it may be that by taking this half-hour for three purposes—Mr. Faulkner to confer with Mrs. Monsen; Your Honor to consult these authorities; and ourselves to consult with the plaintiffs—that we may shorten rebuttal to a very, very few minutes, and then we could proceed further with the case this afternoon; if Your Honor would care to take that into consideration and recess now.

The Court: Well, supposing, if we get a half-hour off this hour, we resume at 1:30.

Mr. Kay: 1:30. Very good.

The Court: Very well.

Mr. Faulkner: Your Honor, I have never seen this contract, and I am grateful to counsel for lending it to me. I wasn't here when it was drawn and I don't know anything about it, and so we would have to go over it and get what we can from that and from Mrs. Monsen personally.

The Court: Well, we have just stated we will recess [534] the case then until 1:30.

Mr. Faulkner: I am sorry I had to ask for that.

The Court: That is perfectly all right, if you need the time.

(Whereupon, the trial was recessed until 1:30 o'clock p.m., November 18, 1955, and resumed as per recess, with all parties present as heretofore and in the absence of the jury from the courtroom; whereupon the trial proceeded as follows:)

The Court: During the noon recess the Court has had an opportunity to go into this question that was raised with regard to the proof of the financial status of the defendant.

I do find that there is apparently ample authority, that is, great weight of authority, sustaining such proposition, that is, only in the case where there is the element of punitive damages, and it seems to be held in a great many decisions, state courts and United States Courts as well, that the defendant's financial condition is a proper consideration for the jury in awarding punitive damages in an action for libel and slander and that the plaintiff may introduce evidence to aid the jury in determining the defendant's financial status. The annotations in 34 A.L.R., beginning at Page 8, fully support the doctrine.

In the case in which my attention was directed to the Supreme Court of California, 184 Pacific 672, the question does not appear to have been directly raised except on a [535] motion for new trial, but the plaintiff there was permitted to testify as to the value of the defendant's property, which he said was worth over two million dollars, and then the Supreme Court considered the question of whether that testimony may have resulted in an excessive verdict because of passion or prejudice and held that it did not and denied the motion for new trial. Apparently the testimony was admitted without objection.

In the case of Washington Gas and Light Co. v. Lansden, 172 U. S. 534, the Supreme Court at least strongly indicates the rule as being applicable but holds that, if the evidence of wealth of one defendant in a libel case would be admissible against the defendant corporation alone for the purpose of enabling the jury to calculate exemplary damages, such would be inadmissible as against other defendants who were also joined, and they make that distinction. I find also some distinction is made as to the degree of proof. Some decisions hold that reputation of financial circumstances is proper or in some cases sufficient. I don't think that is the proper rule, and, even though it may be the majority rule, I think the better rule is that proof should be limited to actual means. I also find, however, that such proof should be general only and that the Court and the jury should not be entitled to try any collateral issue with regard to such wealth.

In view of that fact, I doubt whether the contract [536] may be admitted in evidence. I also doubt whether there may be a question of privilege as to the contract, because it would involve a collateral issue, and I think the questions put to Mrs. Monsen as to the value of the property appear to be fair and proper in the case of punitive damages. Actually, however, I believe that such evidence would be—well, if it is prejudicial at all, it would be against the plaintiffs rather than the defendant.

Mr. Faulkner: If the Court please, we will take exception to Your Honor's ruling admitting the evidence, but in admitting it it will be necessary for

Mrs. Monsen to testify to the sale price, to the debts assumed, to the debts paid out of the portion that she received, and the balance due. Now, that is the way I should think you would have to arrive at it.

The Court: Well, I presume so.

Mr. Faulkner: We will have to go into that. She couldn't say just offhand what it is worth without giving the Court and the jury the figures, and she could be cross-examined on that.

The Court: I presume so. If reference to the contract is necessary for Mrs. Monsen to give that information, then it may be referred to, but I still doubt whether the contract itself should be in evidence, so, if you do that, we simply confuse the jury on some collateral issue, which we are trying desperately to avoid. [537]

Mr. Nesbett: Your Honor, I gave Mr. Faulkner a copy of the contract which I got from the U. S. Commissioner in Juneau on certification, and I will stipulate with him that the only question that may be put and the only answer that need be given is that the Empire Printing Corporation was sold for a net——

Mr. Kay: The assets.

Mr. Nesbett: ——the assets of the Corporation were sold for a net approximately $175,000.00 after considering the debts assumed by the purchaser, and that is all set out in the contract which I have here, if Your Honor would like to go over it.

Mr. Faulkner: No, we can't do that, Your Honor, because that was sold subject to a great

many other debts which came out of $175,000.00 We couldn't very well admit anything like that. We went over the contract at noon because we didn't have any copy here, and I see that I signed it as secretary at that time, but I had nothing to do with drawing it and didn't know its contents at all, and then we telephoned to Juneau to verify some of these figures with the accountant, Ehrendreich, and we have got the figures here all right, but we don't want to have the jury misled by what happened. We want to tell the jury what the sale price was, how much was paid on that sale price and what became of that; that was used to pay debts—it wasn't distributed—and for the taxes; and [538] then how much indebtedness the purchaser assumed out of the sale price; and then that will give you what is remaining.

Mr. Kay: Well, what is the net? Maybe we can just ask that question.

Mr. Faulkner: No; I don't want to do that because I think that would be misleading. The net——

Mr. Kay: What would be misleading about the net?

Mr. Faulkner: The payments of the remainder, which would be the net, are scattered over a period of ten or twelve years in payments, and there is nothing due, as I understand it, until 1956—I mean —yes, November, 1956, on the purchase price. And I think Mrs. Monsen had better—it will only take

a few minutes; she has the figures here—just what the sale price was, how much was paid and what was done with that, and how much indebtedness was assumed, and then what there is left and how that is payable. She hasn't got it in her pocket. It is coming in over a long period of years.

The Court: Then the testimony will be limited, as briefly as possible, to that necessary to explain that.

Mr. Faulkner: Yes. She has made notes and verified it over the telephone.

The Court: Well, that, I expect, will need to be done if you are unable to stipulate as to that matter.

Call in the jury, please.

(Whereupon, the jury returned and all took their [539] places in the jury box.)

The Court: On the matter on which the Court reserved decision as to the objection raised to the question put to Mrs. Monsen concerning the sale price of the assets of the Empire Printing Company, the Court finds upon a careful review of the authorities on the question that such evidence is admissible relating only to the matter of punitive damages; that is, if the jury in such a case finds that punitive damages may be assessed in accordance with the instruction of the Court, they may be guided in arriving at the amount of such damages in part by the financial circumstances. What is punitive damages will be fully explained to the jury.

With that in mind, the objection made to the question is now overruled, so that you may then recall the witness. You may as well recall, if you wish, on further cross-examination, or recall on rebuttal.

Mr. Faulkner: Do you want to recall her on cross-examination?

Mr. Nesbett: Yes. Your Honor, pardon me.

HELEN MONSEN

recalled as a witness on behalf of the defendant, having previously been duly sworn, testified as follows:

Cross-Examination

By Mr. Nesbett:

Q. Mrs. Monsen, I believe you testified previously, did you [540] not, that the assets of the Empire Printing Corporation had been sold to Mr. Allen? A. Yes.

Q. Do you recall the date on which that sale was made?

A. The sale was made June 1st. I don't know what the date of the contract is.

Q. And can you state to the Court and the jury the total sales price of the Empire Printing Corporation, Mrs. Monsen, in that sale?

A. Yes. Can I go ahead and give the whole——

Q. Just answer the question please.

A. Pardon me.

Mr. Faulkner: I think Mrs. Monsen ought to be

(Testimony of Helen Monsen.)

permitted to refresh her memory from the notes she made during the recess. That was the purpose of it.

The Court: Well, the question was purely as to the total sales price. If you need to refer——

A. The total sales price was $235,000.00, and Mr. —we assumed all of the——

Q. Well, Mr. Faulkner will be able to question you too. Now, Mrs. Monsen, it is true, is it not, that that sales price of $235,000.00 excluded from the sale cash which the corporation had on hand at the time and all securities, stocks and bonds issued by any corporation, all land owned by the corporation outside of Juneau, a Chevrolet [541] automobile, and cash advances made to employees, and the corporate books, did it not?

A. Yes. May I ask a question?

Q. No. Mr. Faulkner will examine you. And what land, Mrs. Monsen, did the corporation own outside of Juneau at the time of the sale, which was excluded?

A. A lot near Salmon Creek.

Q. Do you know the size of that lot?

A. Well, I don't know. I think it is fifty feet.

Q. And are there any buildings on the lot?

A. No.

Q. Is it near the roadhouse or——

A. No. It is just a small lot in, I think they call it, the Woodford Addition. Mr. Metcalf could probably tell you that.

Q. Do you know how much cash the corporation had on hand at the time of the sale?

(Testimony of Helen Monsen.)

A. I do not.

Q. Do you know approximately?

A. No, I don't.

Q. And can you state generally what securities, stocks and bonds were issued by the corporation that were on hand and excluded?

A. Yes. We had $250.00 in the Pelican Corporation, of which Mr. Roden, I believe, is chairman of the board. Is that [542] it, Mr. Roden?

Mr. Faulkner: What corporation?

A. Pelican. And $2,500.00 in the Community Building.

Q. (By Mr. Nesbett): What was the value of the Chevrolet that was excluded; do you know?

A. $900.00, I believe.

Q. Were there any—do you know the amount of cash advances that had been made to employees?

A. No. We had to mark those off the books. They were employees to whom we had loaned money.

Mr. Nesbett: That is all.

Redirect Examination

By Mr. Faulkner:

Q. Mrs. Monsen, in this sale price of $235,000.00 what of the indebtedness of the Empire Printing Company was assumed by the purchaser to be paid out of that sum?

A. We owed the bank——

Q. Well, just the total?

A. The total sum is $59,528.00.

(Testimony of Helen Monsen.)

Mr. Kay: Fifty-nine thousand and——

A. And five hundred and twenty-nine dollars.

Q. (By Mr. Faulkner): And that left a then balance, taking that from $235,000.00, of $175,-471.00? Is that right? A. Yes, sir. [543]

Q. Now, of that amount how much was paid down at the time of the contract?

A. $50,000.00.

Q. And that would leave then how much?

A. $125,471.00.

Q. And now, of the fifty thousand what—how was that disposed of, the amount that was paid down?

A. Over $30,000.00 went to taxes, Federal and Territorial taxes, and they have not all been paid as yet, and about $10,000.00 to accounts payable, because Mr.—is that all right?

Mr. Kay: Certainly.

A. Mr. Allen—the payments were cut off as of June 1st, and he had our accounts receivable, and we had the accounts payable, and the money we had on hand did not cover all of the accounts payable.

Q. And you had then a liability of ten thousand, you say?

A. About ten thousand; that would have to be approximate because—I don't know; and a cancellation of King Features Service, which cost us $600.00; and our—we just made Mr. Ehrendreich one payment, I believe, of about three hundred and seventy-five, but that is only a guess; I don't know. Mr. Banfield had a fee of about $700.00; that is also an

(Testimony of Helen Monsen.)

approximate. Then we withheld the expenses of witnesses and attorney's fees for this case of $5,000.00. [544]

Q. That is your expenses? A. Yes.

Q. And what does that total?

A. $47,275.00.

Q. That leaves of the fifty thousand paid how much? A. $2,725.00.

Q. Now, then you still have due, you said, $175,481.00. How was that payable?

A. There is no payment on the principal until November 1, 1956. That is sixteen months after the contract. During that sixteen months interest at 5% is paid, and that totals $523.00 a month, and that is divided between my sister and myself so that I think she has about $154.00 a month and my income is $369.00 a month. November 1, 1956, Mr. Allen will start paying the remainder over a period of thirteen years in 144 payments at $700.00 a month.

Q. Beginning when, did you say?

A. November 1, 1956.

Mr. Nesbett: Is that plus interest?

A. I think there is interest on that, too.

Mr. Nesbett: 5%?

A. 5%; and a decreasing interest.

Q. (By Mr. Faulkner): Decreasing as the payments are made?

A. Yes. And the balance is due of $24,671.00 on November 1, [545] 1968.

Q. 1968. And then on June 1st Mr. Allen took

(Testimony of Helen Monsen.)

over this property? A. Yes; he took over.

Q. And has it now. Now, you say—Mr. Nesbett asked you about what you had in the bank, and you said you didn't know. I will ask if at the time of the sale you owed the bank in Juneau, one of them—I don't know which one—some money?

A. We owed the First National Bank $36,000.00. We were paying off at $500.00 a month, and Mr. Allen assumed that.

Q. That was part of the fifty-nine thousand?

A. Yes, sir.

Q. That he deducted from the purchase price?

A. Yes.

Q. Now, then you said you had liabilities of approximately $10,000.00. Does that mean $10,000.00 over and above any cash you might have had in the First National Bank?

A. Yes. That is an approximate figure.

Q. Do you think it is more or less?

A. I think it is probably more than that. We had —I wish I were prepared.

Q. Well, that would be after deducting your bank account—that is what I am talking about—whatever bank account you had? [546]

A. Yes.

Mr. Faulkner: I think that is all.

The Court: Very well then, Mrs. Monsen—do you have further questions (addressing plaintiffs' counsel)?

Mr. Nesbett: Your Honor, I may have a question. Will you pardon us just a moment?

(Testimony of Helen Monsen.)

Recross-Examination

By Mr. Nesbett:

Q. Mrs. Monsen, there is a balance due now, or as of June 1st, on that sale of one hundred twenty-five thousand four hundred some-odd dollars; isn't there? A. Yes.

Q. And you realized $2,725.00 out of the down payment?

A. That was only an approximation; I don't know.

Mr. Nesbett: That is all.

Mr. Faulkner: Just a minute.

Redirect Examination

By Mr. Faulkner:

Q. Mr. Nesbett said was due on June 1st. I think you better clarify that. That is due——

Mr. Nesbett: As of June 1st.

Q. (By Mr. Faulkner): And that is due on the dates you gave?

A. Yes. It is payable over a period of thirteen years, I [547] believe.

Mr. Faulkner: That is all.

Mr. Nesbett: That is all.

The Court: That is all, Mrs. Monsen.

(Witness excused.)

Mr. Faulkner: Now, if the Court please, I am

going to call Mr. Leivers, the Clerk of the Court, for one or two questions.

The Court: I can swear you, I think, Mr. Leivers.

J. W. LEIVERS

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Faulkner:

Q. Mr. Leivers, you are the Clerk of this Court. How long have you lived in Alaska?

A. Since 1908.

Q. And where? A. Juneau and Douglas.

Q. And during that time—that would be some 46-47 years—have you known H. L. Faulkner, attorney for the defendant in this case?

A. Yes. I believe I knew you, not intimately, back when you were U. S. Marshal around '13 or '14, somewhere along in there. [548]

Q. And since then have you known me quite well since you have lived in Juneau?

A. Yes; I guess I can say that I have become intimately acquainted with you since I came into the Office of the Clerk of the Court in 1929.

Q. And have you been associated with me in various capacities up there, such as lodge work and church work? A. Yes, sir.

Q. And of course in your daily work as Clerk of the Court and as Deputy Clerk before you were appointed Clerk? A. Yes, sir.

(Testimony of J. W. Leivers.)

Q. And that extends how far back, your service in the Clerk's Office?

A. Back to 1929; March, 1929.

Q. And in that time and that acquaintance have you ever at any time or place heard H. L. Faulkner use profane language?

A. No, sir; I have not.

Mr. Faulkner: That is all.

Mr. Kay: No questions.

Mr. Faulkner: I think the defendant rests, your Honor.

The Court: Any rebuttal?

Mr. Kay: We will call Governor Gruening for just a few questions. [549]

Plaintiffs' Rebuttal

ERNEST GRUENING

called as a witness on behalf of the plaintiffs, having previously been duly sworn, testified as follows:

Direct Examination

By Mr. Kay:

Q. Governor Gruening, there have been just a few things which have come up in the defense which I think we ought to try to clear up a little bit. The defense have raised several examples in which they said that—which they gave as examples of their honest differences of opinion with you on matters of public affairs. For example, one of the witnesses for the defendant testified that it was, one of the items in

(Testimony of Ernest Gruening.)

which she opposed you, was that she believed that you were intellectually dishonest on statehood, on your support of statehood. Is that a fact, Governor Gruening?

A. Well, I don't know how I can do more than state most emphatically that I fervently and firmly believe in statehood for Alaska, that I have for many years, that I have written many articles on the subject, that last year I published a book called "The State of Alaska," which gives a long list of reasons, gives the whole history of the statehood movement, and the reasons for it, and it is one of the causes I believe in most profoundly as essential to the future development of our Territory.

Q. Can you think of any reason, Governor, any foundation, [550] for anyone to believe that your position in that regard was intellectually dishonest?

A. Not if they were at all acquainted with the facts and had known how consistently I had supported statehood on every possible occasion, publicly, privately, in the States, throughout the Territory, on the platform, in my writings, and everywhere.

Q. Now, other examples, I believe that two other examples were mentioned, Governor Gruening. One was a difference of opinion or differences of position between the publishers of the Empire and yourself with reference to the Senate investigation into the Union Bank in 1947, and the other a difference of opinion between the publishers and yourself on the matter of the construction of the Palmer Airport. In presenting the examples which you gave of what

(Testimony of Ernest Gruening.)

you termed a campaign against you by the Empire, was your testimony tended, I mean, intended to imply that you objected to the right of the Empire in any way to disagree with you?

A. Certainly not. It is the function of a paper to express itself editorially on public questions, and it has a perfect right, even the duty, to disagree with public officials when it so felt. What I did consider most unfair was the character of the abuse, the abusive terms which they applied to me, the sneering, slandering [551] epitaphs, and the fact that they disagreed with me not merely on the few things mentioned but on practically everything. Apparently, I couldn't do anything right as far as the Empire was concerned.

Q. You mean to say they disagreed with you on everything. Then I take it that your opposition or your displeasure over that was not a thing of their right to disagree with you in any way but only on the manner of its expression?

A. Absolutely. I have been a newspaper editor myself of various newspapers, and I have frequently disagreed with public officials, but I would state those in moderate language, trying to have the facts and the logic convey the basis of my criticism. I never applied epitaphs to the people I was criticizing.

Q. Governor Gruening, I will show you—these are editorials which were shown to Mrs. Monsen this morning but which she was unable to identify; I will just offer the first one, labeled "The Return of 'Alibi Ernie.'"

(Testimony of Ernest Gruening.)

A. Well, this is an example of what I mean.

Q. Is that an editorial printed in the Alaska Daily Empire on the date it bears?

A. On March 15, 1952; yes.

Q. And I will show you an editorial entitled "The Artful Dodger," Wednesday, July 9, 1952, and ask you if that is an editorial which appeared in the Alaska Daily Empire on [552] the date it bears?

A. Yes. This is entitled "The Artful Dodger" and begins by saying "Agile Ernie, the artful dodger, again"——

Mr. Kay: Now, I will offer them in evidence—without objection.

The Court: They may be admitted.

The Clerk: These will be Nos. 13 and 14 in the order they were presented.

Q. (By Mr. Kay): The only other item that I can recall, Governor, is that you were also criticized, or an implication was made that the Empire was fair to you by not publishing or not commenting editorially on the fact that you were absent from Alaska at the time of a steamship strike—I don't recall the date of the strike—you as well as a number of others. Will you comment on that, sir?

A. Well, I was on frequent occasion absent from Alaska. Part of my duty was to go to Washington. I was frequently summoned to Washington by Federal officials, by Congressional committees, to appear at hearings, to appear before boards, and, since

(Testimony of Ernest Gruening.)

we have only a voteless delegate from Alaska, he more than welcomed the assistance of someone else to come down there and testify in behalf of certain measures, and those visits were on official business, and they were for the benefit of the Territory.

Q. Did you, as a matter of fact, take as active a part as [553] you could in the settlement of that particular strike?

A. I took an active part in attempting to settle practically every strike that occurred, but in any event, if I had not been here in Juneau physically, the Acting Governor was always there. My office did not cease to function because I happended not to be in Juneau at any particular time.

Q. The Secretary of Alaska, the Acting Governor, was here and discharging your duties in your absence from the Territory? A. Yes.

Q. The editorial of March 15, 1952, I am not going to read all of it by any manner of means, but it will be available to the jury. It is offered, again, as an illustration only. It is entitled "The Return of 'Alibi Ernie,'" "'Alibi Ernie'" being in quotes.

"On his return from Washington, Alaska's part-time governor was ready with the usual alibis for the latest failure of the statehood bill.

"As usual, the alibis are specious and backed by the usual phony statistics."

The editorial of Wednesday, July 9, 1952, is entitled "The Artful Dodger." It begins: "Agile Ernie, the artful dodger, again managed to sidestep comment on the notorious Palmer Airport

(Testimony of Ernest Gruening.)

deal." And concludes: "We hope, however, that the people of Alaska will read and remember. [554] We hope that they will become aware of the rottenness of the Gruening administration and take positive steps to put Alaska's house in order. The October elections offer a fine beginning."

Who was the "Artful Dodger"?

A. The "Artful Dodger" was a well-known character in a classic novel by Dickens called "Oliver Twist." He was a pickpocket. He was a thief. He was a member of "Fagan's Gang, who was pictured in this book "Oliver Twist" as going out and picking people's pockets and trying to teach Oliver Twist, who had been conscripted into this gang, to do the same thing.

Mr. Kay: No further questions.

Cross-Examination

By Mr. Faulkner:

Q. Governor, you heard Mrs. Monsen's deposition regarding your attitude on statehood, which you just mentioned, I believe, where you just referred to the fact that she said your attitude on statehood was intellectually dishonest? You heard the deposition read?

A. Well, I remember that statement.

Q. Do you remember that is where you got it, from listening to the deposition?

A. I don't remember where it was made. [555]

Q. It was either from her deposition or her testi-

(Testimony of Ernest Gruening.)

mony? A. Will you refresh my memory?

Q. Well, I think it was in the deposition, Governor. A. She stated it in the deposition?

Q. Yes. Well, what I was going to ask you was, don't you recall that she said she was repeating hearsay that Colonel Olson and Mr. Rasmusson said when she used that language?

A. That Colonel Olson and Mr. Rasmusson said so?

Q. Yes. A. About me?

Q. Yes. That is what her deposition was, not her direct accusation, but she was repeating theirs. Do you recall that in the deposition?

A. Which Mr. Rasmusson was that?

Q. The senior Rasmusson.

A. Who is now dead?

Q. Yes.

A. I doubt very much if he ever made any such statement. He was an honorable man.

Q. But that isn't the question, Governor. Do you recall that, when she said that in the deposition, she was quoting them, Colonel Olson and Mr. Rasmusson; she said she was quoting them?

A. Well, then she doesn't believe it herself?

Q. I don't know. She didn't say so. Now, Governor, during [556] the incident of that steamship strike in 1952—I think you maybe misunderstood that—there wasn't any charge made against you particularly for being out of the Territory at that time, was there?

(Testimony of Ernest Gruening.)

A. Well, I don't know just what the charge, that the defendant makes, is. Something was said.

Q. It wasn't a charge at all, Governor. It was testimony that six or seven important officials were absent from the Territory at that time. It was just a statement of fact. A. That might well be.

Q. Yes. So there was no charge of your wrongdoing there so far as wrongdoing is concerned, was there?

A. Well, I think it was assumed that, as long as the defendant brought it up, that it must be in the nature of a criticism.

Q. Well, yes, you assumed that, but they weren't all in the nature of criticism.

A. Well, all right.

Q. What I was trying to get at, Governor, and I think the testimony shows that all of these officials were out of the Territory at the time of the strike and the Chamber of Commerce had to advance money to hire a lawyer in Seattle to represent the interest of the Territory, which might not have been necessary if all of these officials [557] or some of them had been here.

A. Well, you realize, don't you, that the Attorney General is an elected official and is not responsible to the Governor. He is only responsible to the people, and, therefore, he being the official who would take charge of that, I have no responsibility for him.

Q. That is true, Governor, and what I wanted to clear up in your mind is, you understand the testi-

(Testimony of Ernest Gruening.)

mony didn't accuse you of having any responsibility—— A. I am happy to hear that.

Q. ——in that respect. It was just simply the fact that—all the testimony shows is the fact that so many officials were out of the Territory at the time. That is all. You understand that, don't you?

A. Yes.

Mr. Faulkner: I think that is all, Your Honor.

The Court: That is all then, Governor.

(Witness excused.)

HENRY RODEN

called as a witness on behalf of the plaintiffs, having previously been duly sworn, testified as follows:

Direct Examination

By Mr. Nesbett:

Q. Mr. Roden, you have heard the testimony concerning the location of various Territorial officials at the time the [558] Alaska Steamship strike occurred, have you not? A. Yes, sir.

Q. Where were you at the time that strike occurred? A. I was in Juneau.

Q. And do you know where Attorney General Gerald Williams was?

A. He was in San Francisco apearing before the Circuit Court of Appeals.

Q. On Territorial legal business?

A. That is right.

Q. And I will ask you whether or not you your-

(Testimony of Henry Roden.)

self on behalf of the Territory went to Seattle to represent the Territory's interest in connection with that strike? A. I did.

Q. And what, briefly, did you do in that connection?

A. The lawsuit had been commenced by the Alaska Steamship Company against the Seattle Longshoremen's——

The Court: Pardon me, counsel, before we go into that. Aren't we getting off the track again into something that is collateral?

Mr. Nesbett: It might be collateral to begin with, but we don't like the jury to have the impression that everybody was asleep at the switch.

The Court: Well, very well.

A. Well, the suit, as I say, had been commenced by the [559] Alaska Steamship Company against the Seattle Longshoremen's Union. The question was whether or not the Territory might find a position in the lawsuit, in other words, as the lawyers call it, whether or not we could intervene. We got in touch with a Seattle law firm—I did—and they said in their opinion we could intervene. Then I called up the Attorney General in San Francisco and told him about the situation, asking him to come to Seattle and represent the Territory. He said he could not come, and he deputized me to go down there and represent the Territory, and I did represent the Territory and participated in the prosecution of the suit, which we won.

Q. Mr. Roden, you heard Mr. Daum's testi-

(Testimony of Henry Roden.)

mony with respect to the articles appearing on the front page of the September 25th publication of the Empire, entitled "Roden, Metcalf Say 'Nothing Crooked' Here," to the effect that you were interviewed as well as Mr. Metcalf prior to this publication. I will ask you whether or not Mr. Daum did interview you prior to this publication in which he quotes you as saying "'Nothing Crooked' Here"?

A. I never used the expression "Crooked," never used it in my life.

Q. Mr. Roden, I will ask you again whether or not Mr. Daum interviewed you with respect to the printed article "'Nothing Crooked' Here" prior to its publication? [560] A. He did not.

Q. Are you positive? A. I am positive.

Q. And, if he testified that he did interview you, and prior to the publication, and that you, as well as Mr. Metcalf, said "'Nothing Crooked' Here," would he be incorrect in your opinion?

A. He would be incorrect.

Mr. Nesbett: No further questions.

Cross-Examination

By Mr. Faulkner:

Q. Mr. Roden, do you mean to say that Mr. Daum did not come to you to discuss this matter prior to the publication?

A. He came to me the first time on the 26th of September, the day after the publication.

(Testimony of Henry Roden.)

Q. Did anybody else come to you about this?

A. Not that I know of.

Q. Well, did Mr. Homer come to see you?

A. No. Well, let me explain this. Mr. Homer came to see me about a half a dozen times a week. He had always some complaint about something. He was either in difficulties with the Coast Guard about something, about this or that, or this or that didn't suit him. In other words, Mr. Homer, having lost the ferry, was trying to do his best [561] to devise some scheme to get it back, and I, being the old man——

Q. Just a minute.

A. ——he came to me and, so to speak, wept on my shoulder about this and that and everything else.

Mr. Faulkner: Just pardon me. I think we will have to object to the testimony of the witness as opinion and argument to the jury.

The Court: The opinion may be stricken.

Q. (By Mr. Faulkner): Mr. Roden, you say Mr. Homer came to you frequently. Didn't he come to you and complain to you about the way the purser was handling the ferry funds? A. No.

Q. Didn't he complain to you about the practice that was being followed with reference to deductions from the crew—the wages?

A. Yes. He complained about deductions for the food they were supposed to be getting.

Mr. Nesbett: Your Honor, as long as you have stricken Mr. Roden's answer as being irrelevant, I

(Testimony of Henry Roden.)

see no reason for Mr. Faulkner to pursue the same subject further, again.

Mr. Faulkner: Mr. Roden said Mr. Homer came to him and complained, and I was objecting to his argument about Mr. Homer and the Coast Guard and weeping on his shoulder and always something to complain about. I am asking him what he [562] complained about with respect to——

The Court: Counsel, I do not recall any questions asked of Mr. Roden on direct examination about Steve Homer. Did you ask any questions about Steve Homer?

Mr. Nesbett: I did not; no, Your Honor.

The Court: Well, then where is this proper cross-examination at all?

Mr. Faulkner: Well, Your Honor, of course it is. Mr. Roden said, Your Honor, that nobody complained—that was in his direct examination in chief —that nobody ever complained about this ferry.

Mr. Kay: The subject was whether anybody came to him concerning the—whether Jack Daum came to him concerning the publication.

The Court: That is all that I heard.

Mr. Faulkner: I asked him if anybody else came to him, and he said yes, Steve Homer.

Mr. Kay: Steve Homer wasn't employed by the Empire.

Mr. Faulkner: That is all right. Mr. Daum testified that Steve Homer brought these complaints to him.

Mr. Nesbett: The fact still remains, Your

(Testimony of Henry Roden.)

Honor, that he objected to the answer, and it might not have been quite responsive. Your Honor ordered it stricken.

The Court: Well, I said his opinion.

Mr. Nesbett: And now he pursues the subject after [563] his own objection.

The Court: Well, strictly speaking, it is not proper cross-examination. However, I feel it is not a serious error to permit the questions to be answered so far as they may be wholly relevant and material.

The last question was what, Miss Maynard, if you can find it?

The Court Reporter: The last question was answered.

The Court: Well, then what are we considering?

The Court Reporter: "Q. Didn't he complain to you about the practice that was being followed with reference to deductions from the crew—the wages?" "A. Yes. He complained about deductions for the food they were supposed to be getting."

The Court: The Court holds that that evidence is irrelevant and immaterial, and the answer may be stricken.

Mr. Faulkner: That what?

The Court: That it is certainly irrelevant and immaterial, and the answer may be stricken.

Mr. Faulkner: As I understand the rule, Your Honor—I want to get it clear—we don't have to take exceptions.

(Testimony of Henry Roden.)

The Court: Well, counsel, here is the point. You are not precluded from asking him if there were any complaints made about the use of this fund.

Mr. Faulkner: No, Your Honor.

The Court: But to go into something else about the [564] food, what has that got to do with this case?

Mr. Faulkner: It definitely is material, Your Honor, but I am not complaining about that. I am just asking a point of information. I don't want to be taking up the Court's time and the reporter's time with taking exceptions if they are not necessary.

The Court: No; no exceptions are necessary.

Mr. Faulkner: No. That is all, Mr. Roden. That is all.

Mr. Nesbett: The plaintiffs rest, Your Honor.

The Court: I presume there would be no surrebuttal, or do you suggest any, Mr. Faulkner?

Mr. Faulkner: Pardon me?

The Court: Do you require any surrebuttal?

Mr. Faulkner: Pardon me just a moment. No, I think not, Your Honor.

The Court: The matter of the preparation of the instructions in this case has been one involving considerable labor, and it is very difficult to complete such instructions immediately upon the conclusion of the evidence. The Court will need a little further time to complete such, and I think it best that we do that before we proceed to argue this

case. In fact it might be helpful to counsel if we could get copies of the instructions in their hands before argument, although we are not required to do so. [565]

Mr. Kay: We certainly would appreciate it, if the Court please.

The Court: Also, there have been handed to me just at noon or before noon a considerable number of requested instructions, and I haven't yet had an opportunity to go into them on account of reviewing this other matter at noon. I might suggest that we do this—excuse the jury until 3:15. Mr. Faulkner?

Mr. Faulkner: If the Court please, I have a motion which I filed this morning and gave to your secretary, and I would like to be heard on it at this time. And then was it the purpose of the Court to have the instructions ready by 3:15?

The Court: That is what I was just about to say, that I would try to do so.

Mr. Faulkner: What is that?

The Court: That is what I was just about to say, is that I would try to do so.

Mr. Faulkner: I was going to say, I would like to be heard perhaps on some of those that I submitted, and I thought if we could—I don't know what Your Honor's——

The Court: I do not think it is a good practice for the Court to engage in a hearing on the matter of instructions. I have never seen it done. I assure counsel that we have gone into all these matters—I have—at [566] considerable labor night after

night, and I see no reason why we need to go into argument on the instructions. To me it is wholly out of order. If the instructions are erroneous, they may be corrected.

Mr. Faulkner: I didn't mean argument, Your Honor. What I meant was to try to find out as much as we can what the Court is going to give and what the Court is not going to give.

The Court: Well, I was just about to say, counsel, this, that I am trying to work out a schedule here. The jury may be excused until 3:15 at which time we should be ready to hear the arguments of counsel and following that the instructions of the Court. If counsel will return at 3:00 o'clock, I am quite certain I will be able to rule upon the requested instructions—if that is what you had in mind.

Mr. Faulkner: Yes.

The Court: So, that, of course, we should do out of the presence of the jury. However, first, if you wish, before we adjourn—and then perhaps we better extend that another ten minutes; perhaps I better say 3:30 instead of 3:15—we will hear from you, Mr. Faulkner, on your motion. Do you wish to state your motion at this time, and then we will argue it out of the presence of the jury?

Mr. Faulkner: Well, I wouldn't think that I should state it in the presence of the jury, Your Honor.

The Court: Well, the practice has been both ways. [567] My own judgment is that it is quite proper to state your motion in the presence of the

jury but argue it out of the presence of the jury because it may involve a discussion of the facts.

Mr. Faulkner: All right. I will do that.

The Court: Well, if you can, just state your motion very briefly.

Mr. Faulkner: Well, the motion is to instruct the jury to find a verdict for the defendant. And then, if the Court please, I would like to elaborate upon that a little, and that should be done outside of the presence of the jury.

The Court: Well, then the jury may be excused until 3:30. It will not be necessary to remain around here unless you wish, and, as soon as the jury has retired, we will hear counsel upon this motion.

(Whereupon, the jury retired from the courtroom.)

Mr. Kay: Your Honor, am I correct or incorrect, that, if both parties join in a request for a directed verdict, in other words, they move for a directed verdict on behalf of the defendant and we move for a directed verdict on behalf of the plaintiffs, doesn't that have the effect, that is, one effect —I don't know whether it still does under the Federal Rules—of taking the case from the jury?

The Court: I do not know really.

Mr. Kay: I believe it does have the effect of taking the case from the jury, Your Honor. If it does, we [568] will then make such motion (departing toward the Court Library).

The Court: Can you put your finger on the rule with regard to—well, there is no such thing any

more as a directed verdict under the rules, but, that is, in a civil action the rule is with regard to a judgment on behalf of either party. I wonder if they are not thinking of criminal procedure.

Mr. Faulkner: I think so, Your Honor. I put my rules out here (departing toward the Court Library).

Mr. Nesbett: As far as I have ever been able to learn, there is no arrangement for directed verdict in a civil case. It is all directed judgments (departing toward the Court Library).

The Court: Well, suppose we recess a few minutes until we look into this. I am not even aware that there is any rule for such a motion in a civil case.

(Whereupon, Court recessed for ten minutes, reconvening as per recess, with all parties present as heretofore and in the absence of the jury from the courtroom; whereupon the trial proceeded as follows:)

The Court: Before proceeding expressly for a motion for directed verdict under Rule 50 of the Rules of Civil Procedure, I think what I had in mind was the Rules of Criminal Procedure rather than the Civil Procedure, and it also does appear, if both parties join in such a verdict by motion, that such is not a waiver of trial by jury. [569]

First, however, it is now determined that the better procedure here would be to try and determine the ruling of the Court upon your requested instructions later this afternoon, then excuse the jury to

report tomorrow morning at which time the arguments of counsel may be made and the Court will then instruct the jury rather than having to send the jury out at a late hour this evening when everybody is exhausted, including probably the jury, so that we will do that. I have already asked the bailiff if he will notify the jurors who may still be in the building, and, those who return at 3:30, we can inform them at that time. So, we will then hear first from the counsel for the defendant on the motion for directed verdict.

Mr. Faulkner: The motion, Your Honor, is for a directed verdict for the defendant in each of the consolidated cases.

(Whereupon, reporting of the arguments on the motion was waived by respective counsel and the Court.)

Mr. Kay: We did not make any motion; we suggested we might; if we did, we withdraw it.

(Whereupon, the Court reporter was excused from the courtroom, and was thereafter recalled to the courtroom; whereupon, the following proceedings were had:)

The Court: On the motion of defendant for directed verdict and having heard the arguments of counsel for the defendant, it will not be necessary to hear from counsel for [570] the plaintiffs on the matter for the reason that the Court is convinced that there are issues of fact here which must be

submitted to the jury and that the motion for such directed verdict will not lie.

Now, taking up the points raised in the arguments submitted by the written brief as well as orally; first, as to the reference to the article which appeared on the left-hand column of the paper and the subheadline "Reeve Raps Graft, Corruption," it is conceded that the subheadline made no direct reference to any one of the plaintiffs; but the question of whether by innuendo, or, rather, by imputation, not innuendo, the arrangement of that headline with respect to the check which appears immediately underneath it may be construed as leading the ordinary person reading it to a belief that the graft and corruption may relate to the check is a question for the jury. Aside from which, it is not the only charge of libel that is here. It is only one of several complaints against the publication; therefore, I find no merit to that contention.

As to the second point, it is argued that the handling of the ferry funds, public monies, were a violation of the laws of Alaska, that is, Sections 12-2-1, 12-3-1, and the other I do not have here, which is amended by Chapter 133 of the laws of 1951—I think it is 12-2-3, if I remember correctly; no; there is also a reference to 11—well, at any [571] rate the laws of Alaska with reference to the receipt and disposition of public funds, being a section of the Code as amended by Chapter 133 of the laws of 1951, if that be applicable, that is, that the handling of such funds in violation of these sections would be a violation of the law and, therefore, it

could not be a libel for the defendant to make a statement that plaintiffs had violated the laws of Alaska in the receipt and disbursement of public monies—with that, why, the Court agrees—and the publication here simply charged the plaintiffs with violating the law with relation to the manner of receipt and disbursement of public funds, and, if that be shown to be true, it would not be libelous; but counsel overlooks which to the Court appears to be a very important distinction, and that is the violation of any of these statutes is not a crime and cannot be made criminal, cannot be the subject of a criminal prosecution.

We find that clearly the article published imputes to the plaintiffs the commission of a crime. It compares them with Oscar Olson, and the Oscar Olson case, who is serving a term in the penitentiary for the commission of a crime. It suggests that the matter has been referred to the United States Attorney for criminal prosecution. All of those things clearly impute the commission of a crime, and the jury will be so instructed, and it is, therefore, libelous per se; but we are unable to find whether the violation of any of these statutes is in fact a crime; as a matter of [572] fact, the contrary appears.

Section 12-3-3 of the Compiled Laws provides expressly that if any officer or employee shall—any officer or employee approving or certifying a voucher—and I think the same thing would be true of failing to approve or certify a voucher—shall be held accountable for and required to make good to the Territory any illegal, improper, or incorrect

payment resulting from any false, inaccurate, or misleading certificate or for any payment prohibited by law or which did not represent a legal obligation of the Territory.

For violation of that law then these officials constituting the Board could have been held to account for any monies which were not eventually turned over to the Territory which belonged to the Territory. It is also certainly a rule of law that any interested taxpayer, in this case, say, anyone who pays taxes under the motor vehicle fund, could bring an action against the Board and members of the Board to enjoin them from putting the monies into a separate account or an action in the nature of mandamus to compel them to put the monies into the general fund or the motor vehicle fund. Those are the remedies provided for violation of these statutes, but they are not a crime, and in no sense can such acts be considered criminal. The difficulty is here that the article in the Empire directly imputes to them the commission of a crime. Therefore, publication cannot be [573] justified under the provisions of these statutes.

Now, coming then to the third point, that the comments in the article containing the facts of the ferry fund and in the editorial which contained a reference to Oscar Olson are justifiable as fair comment for the reason that the manner of handling the ferry funds, being a violation of the law, made the plaintiffs subject to the provisions of the same law under which Oscar Olson was convicted and sentenced to prison, we find no merit whatever in that

contention. We find that strictly and absolutely as a matter of law there can be no comparison in the legal construction of this statute for Section 65-5-63, to which the witness Daum said his attention was directed by Auditor Moore, defines the crime of embezzlement of public money. In order to constitute that crime either one of three things must be shown; either that the person accused must be shown to have converted money to his own use, and that means stealing the money; or it must be shown that he illegally loaned the money; or that he failed to account for such money on demand.

Mr. Faulkner: Or as directed by law.

The Court: Or as directed by law; pardon me; not on demand, but as directed by law. Now, there is no evidence of any of those things here. It is admitted that there is no claim that the plaintiffs ever actually converted any of these monies of the ferry fund to their own use. It is admitted [574] that any such imputation, if intended by the article, is untrue. There is no evidence of their failing to account for any money, no evidence whatever, neither through the audit which was offered here or any other means.

The only other possibility of such statute being applicable to the violations here alleged, which is the theory of the counsel for the defendant, is that the placing of this money in a separate bank account constitutes a loan to the bank. I have carefully considered that question. I find that, if monies are deposited in a bank in an account under which the bank pays interest to the depositor, a savings ac-

count or certificate of deposit, that there is a loan to the bank, but otherwise, if money is deposited in the bank subject to check, the authorities are very definite in holding that such does not constitute a loan. It is true that the relation of debtor and creditor exists to the bank, and it can be called upon as a creditor to pay the money to the depositor, but that does not constitute a loan. The Court definitely finds that depositing of the monies in this ferry account does not constitute a loan, and, even if that were so, it would be very farfetched to suggest under this publication that the comparison to the Oscar Olson case was because these parties had loaned the money, so there is certainly at least a grave question for the jury to determine whether there was an imputation that they had embezzled or stolen the money in the ordinary sense in which [575] the term is generally used and known to the public, and that is important here. Therefore, we can find no parallel in the provisions of 65-5-63 or in the provisions of the other statute under which Olson was actually convicted, which is to the same effect except that it relates to the duties of the Treasurer.

Now, with regard to fair comment, we are entirely in accord with counsel for the defendant that, if under the evidence there is no sufficient showing of any language in the published, or, in the case of slander, of the spoken, words which are susceptible of being defamatory, then it would be the duty of the Court to grant the motion. It has the same effect as a motion for a judgment of acquittal

in a criminal action; that is, the Court may find that there is no evidence to go to the jury sufficient to constitute the crime and, therefore, take the case away from the jury; but we certainly cannot so find here. There is ample evidence in the opinion of the Court to go to the jury on the question, if not a question, of whether there was or was not language in the publication complained of which was defamatory or capable of a defamatory meaning. It is also confessed that the rule of law that in judging the article all of the article must be considered and read, and, possibly, if there was only one word which was interspersed somewhere in it, which may be considered to be defamatory, that could be disregarded, but by reading it in [576] the entirety we think, just what it says, we mean that all of it may be considered, and it is no more logical to suggest that we should exclude those portions which may be defamatory than it is to say that we should exclude those which are not, and, definitely, some of the reported articles about reported facts may not be considered defamatory, but, if we consider it all, we are entitled to consider those portions of it which may be held to be defamatory.

In the same manner as to privilege, we have no quarrel with the defense of counsel that there is here a qualified privilege, except this, that I think it is also the law that there is no qualified privilege as to charges of fraud or corruption unless it be shown that there is no malice. All of these are questions for the jury.

We will not submit to the jury, as has been re-

quested by counsel for plaintiffs in one of their instructions, that there is only an issue of damage. I feel that there are certain other issues with regard to the allegations of truth and that despite the fact that such allegations are not justified under the provisions of the statute cited and that particularly by reason of the claim that there was a justifiable comparison or parallel with the Oscar Olson case on account of the use of the special fund. I think that raises a question for the jury to determine.

But, certainly, the matter will be submitted to the [577] jury with full instructions on the question of privilege and full instructions on the question of justification as to the truth of the publication constituting the defense, because we are obliged to instruct and will instruct the jury that no such justification can be placed upon the construction, contended for by the defendant, of these statutes, because that is a matter of law and not a matter of fact.

Mr. Faulkner: Is the Court finished?

The Court: Yes.

Mr. Faulkner: If the Court please, I would like a little further enlightenment on just what the defendant may argue. As I understand—I don't want to get into argument and have the Court disagree with me and interrupt me and stop me, and I will try to confine my argument to the Court's rulings on the law as we have gone along, but, then, do I understand that we can argue that we contend these facts were true, that there was a setting up of this

special ferry fund, the placing of these monies in the custody or under the control of a man who was not an official and had no bond, and then our contention with reference to what was meant by the parallel to the Olson case.

The Court: Oh, yes; that issue will be fully submitted. That, I think, is the principal question for the jury to decide here—what is meant in the ordinary sense by this publication; whether what was meant was to charge the [578] plaintiffs with embezzlement in the ordinary sense, or whether what was meant was merely to charge them with the violation of their duties with respect to the handling of these funds illegally, or whether such was done illegally. I think that is a question for the jury.

Mr. Faulkner: Yes.

The Court: But my point is that we cannot—the jury will be instructed definitely that such acts are not criminal unless they come within the definition of the statute with regard to embezzlement regarding the conversion of public money to their own use.

Mr. Faulkner: Well, of course, we didn't charge that.

Mr. Nesbett: It is not charged.

The Court: I say, that is the only way in which there could be a justification under the statute, because that is what the statute says—if there is a conversion to their own use. It doesn't say—for illegally depositing and paying out money without the approval of the Auditor.

Well, again, we will try and—we will try and announce the ruling on the requested instructions at

4:00 o'clock. We will recess until that time. Did I say, finally, that the motion of the defendant for directed verdict will be denied.

(Whereupon, Court recessed until 4:00 o'clock p.m., reconvening as per recess, with all parties present as heretofore and in the absence of the jury from the courtroom: [579] whereupon, the trial proceeded as follows:)

The Court: We will now take up the matter of the proposed instructions, which the Court will endeavor to rule upon. They are voluminous. It is difficult to cover every precise point, but we will endeavor to do so.

Taking up, first, the Plaintiffs' Proposed Instructions and turning first to No. 1, this instruction is granted in substance. It has been partially covered, and I think, possibly, some little addition should be made to the instruction prepared touching upon the responsibility of a corporation for the acts of its servants or agents, so that I will modify it some to avoid any possible comment upon the evidence.

No. 2, the proposed instruction with regard to retraction has been covered as to the matter of it being considered not only as a retraction, which the Court finds must be done simultaneously and not afterwards, but also in the matter of the mitigation of damages. However, I will not instruct the jury that the editorial named "Attention," either as a retraction or explanation, should not be considered by the jury for any purpose. That portion of the requested instruction is denied.

Plaintiffs' No. 3, this request is covered with respect to the imputation to the plaintiffs of the commission of a crime and that such is libelous in itself and the presumptions of law arising therefrom. However, the jury will also [580] be instructed that presumptions of this character, like all presumptions, may be rebutted, that is, presumptions of malice and injury. The defendant may rebut such presumptions by competent evidence upon which the burden rests upon the defendant. As to the third paragraph of the Requested Instruction No. 3, I do not propose to instruct the jury that the acts compared the, or, that the publication compared the acts of the plaintiffs with those of an admitted embezzler. I will instruct the jury that they impute the commission of a crime. I am not going to determine as a matter of law that the imputation was the crime of embezzlement on account of the grave conflict of the evidence here as to what was intended and as to what may reasonably be imputed. I firmly believe that that is a question for the jury and not for the Court to determine. There is here a serious conflict in the evidence upon that point, as to what may reasonably be intended. The Court will not invade the province of the jury by determining that particular point. The jury will be instructed that it is the exclusive province of the Court to determine whether the matter is libelous per se or not. They will be instructed that the publication here is libelous per se in that it imputes the commission of a crime, but I am not going to say that it imputes

the commission of the crime of embezzlement. That is for the jury.

Plaintiffs' Instruction No. 4 with regard to malice [581] and the distinction between legal malice and actual malice is covered by other instructions substantially as set forth here.

Plaintiffs' Proposed Instruction No. 5, in which the Court is requested to instruct the jury that the only question for their decision is the extent of damages, is refused for the reasons already recited. I debated this question at very considerable length, particularly under the pleadings. It did appear from the pleadings that would be the only issue, but, as we got into the trial, I find that there are other issues to be submitted to the jury, and, therefore, cannot grant such request.

No. 6, that is very questionable. I think it confuses the matter of justification of the question of malice and confuses it so that I cannot tell what it means. For that reason the instruction is refused, but it is covered, so far as the law is applicable, by other instruction.

No. 7, I have at the bottom here, I think. Oh, I beg your pardon. It was No. 12. I thought we had two sevens. I believe that that is at the bottom, but it is No. 7. No. 7 is covered substantially by the instructions as prepared except, again—there is no exception; it is covered substantially by the instruction prepared. Referring to the second page of No. 7, the first paragraph is covered, and the second paragraph is likewise covered, and in this particular respect I find a conflict between the instructions

prepared by the parties. Plaintiffs [582] propose that the jury should be instructed that they are not obliged to allow the plaintiffs any sum by way of exemplary or punitive damages, the fact that they are entirely separate; that is what I find to be the law. The defendant's instruction, which we will come to after this, is contrary to that. And, particularly, that portion of the instruction is covered with regard to exemplary damages, if it is a matter of honest belief—well, not only exemplary damage, but the matter of actual malice—without malice involved—actual malice as it may relate to either compensatory or punitive damage is covered by the instructions prepared.

No. 8, this instruction has been fully covered by the instructions prepared, except I had not used the word "qualified." I am not certain whether the jury might know what that means. I used the words instead that there was a measure of privilege. Perhaps it may be more accurate to use the term "qualified," and I will try and do so.

No. 9 is, I think, a correct statement of the law and is granted except as to the last paragraph. I do not know how we can expect the jury to determine as to whether the defendant has proved that plaintiffs committed all the elements of the crime, both in act and intent. I find that there were previously decisions on this subject as harsh as stating that they must prove the allegations of the crime to the same extent as is done on indictment or information. I [583] find that that rule has been modified. We do not need to go that far. That in sub-

stance would be requiring the jury to try the guilt or innocence of the plaintiffs. The rule as to justification does not go quite that far. Therefore, the instruction will be modified accordingly.

No. 10 had not been covered but is granted in substance, though slightly modified, again with the view of avoiding any direct comment upon the evidence, which the Court is not permitted to do.

No. 11, upon which there is considerable disagreement amongst counsel, I, as previously stated, feel that this instruction is proper and that we have not for consideration here before this jury any issue as to whether a shortage occurred in the Chilkoot funds as handled by the purser, Coughlin. There is no allegation, no reference, to such in the published articles or editorially upon which the suit is based. There is no evidence whatever in the testimony of Mr. Daum that he knew of any such shortages at the time he wrote and published the article. He testified only that the witness Larsson (Steve Larsson Homer) told him that there was going to be something break about this account. There is no indication whatever from his testimony that he knew of any such shortages. The audit was prepared months afterwards. It is alleged there was no such shortage. But, actually, I did not find that it did. In any event, it had no place in this suit with regard [584] to the truth or falsity of the publication. Therefore, that instruction will be granted.

Now, turning to Defendant's Requested Instructions, No. 1, which, largely, defines the issues, is covered by other instructions.

No. 2 is—no—there is one reference here to a false and unprivileged publication, which the Court particularly notes in the definition of the law of libel, which will be added, although the question of privilege had been fully covered by other instructions. We will add that phrase.

No. 3, with reference to the matter of privilege, is fully covered by the instructions, I think, substantially as set forth in this request, well, except for omission of the words "although defamatory."

Mr. Faulkner: What is that, Your Honor?

The Court: Omission of the words "although defamatory." Actually, I cannot find that a criticism, which is actually defamatory, is privileged. It is privileged if it is not defamatory.

Mr. Faulkner: Is that the quotation from the "Restatement"?

The Court: The quotation says that "matters of public concern is privileged if the criticism, although defamatory."

Mr. Faulkner: Well, didn't I correctly quote there, [585] Your Honor?

The Court: Well, I cannot believe that that is the law, even though the "Restatement of the Law of Torts" may so indicate. It may be qualified by what follows, that is, if it is under "a true or privileged statement of fact" or "represents the actual opinion of the critic" and "is not made solely for the purpose of causing harm to the other." Now, I find that the question of privilege does not go quite that far, but the instructions will be granted insofar as I can find that the law is applicable.

No. 4 is covered by the instruction except that on Page 2 of this instruction the word malice used here as meaning actual evil-mindedness should be and is corrected in the instructions given to refer to actual malice and not legal malice, and I have endeavored to draw the distinction between those two things, which is a very confusing matter to anyone, particularly to jurors, and I have endeavored to make that distinction as clearly as I possibly can do so. At least, the jury will be instructed that there is no presumption of the existence of actual malice, which must be proved, but that there is a presumption of legal malice where a matter is libelous per se.

Instruction No. 5 is denied for the reasons already assigned in ruling upon the defendant's motion for dismissal; that is, the question of the inference as to this subheadline [586] is one for the jury, and not for the Court to decide as a matter of law.

In Instruction No. 6 the reference to the statutes here involved, that is, Chapter 133 of the laws of 1951, is covered by instructions, although I did not find it necessary to quote the statutes in full, which I think would only confuse the jury, and to that effect, to that extent, the instructions cover it. However, the request that we instruct the jury that the actions of the plaintiffs, the Board of Road Commissioners, was a violation of these laws will be denied. That, again, is not for the Court to determine. There is dispute on the evidence. The defendant says they were. The plaintiffs, particularly Mr. Roden, say it was not. I am not going to decide that

question. I leave it to the jury to decide. As to the last paragraph of No. 6, again with reference to the discrepancies of the ferry fund, that is denied because it is not relevant to the issues of the case. Oh, yes; there is a No. 6 alternate. No. 6 alternate is likewise covered with reference to calling attention of the jury to the sections of the Compiled Laws here set forth, which I think should justly be called to their attention in deciding these issues, although, again, I have not seen fit to quote them in full. The remainder of the last paragraph of the alternate instruction, indicating that it is undisputed that the accounts found discrepancies in the ferry fund, is denied, first, because [587] there was certainly a dispute on that fact, and, second, because we have found that it is irrelevant.

Instruction No. 7 is denied, because I cannot find that the law defining the crime of embezzlement covers cases where public funds are not deposited in the right account, if it is so that they were not, unless there be a conversion of those funds to the use of such person, and that, as stated in the ruling upon defendant's motion, the deposit of monies in the bank account does not constitute a loan in violation of that statute. The Court will instruct the jury instead that, as far as the statutes concern embezzlement, that there is no parallel of fact in this publication. We will instruct the jury that, as to any issue of the device claimed by Mr. Moore and other witnesses, that that is presented, although it is very difficult to prepare an instruction which will not be inconsistent upon that point. I will certainly try.

Instruction No. 8, in regard to the parallel of the Oscar Olson case, must be denied. The matter of fair comment and criticism covered by this instruction is covered by other instruction, but I do not think the test is whether the editor, who in good faith considered the matter to be fair comment and privileged, or whether the words in the sense in which they were used, in the ordinary meaning which they were given, are fair comment and privileged, and the jury will be so instructed. [588]

No. 9 is covered by other instructions except as to the explanation published. Instructions prepared are to the effect that such do not constitute a retraction unless the truth of the statement published was admitted, which I think is definitely the law. Merely to publish the explanation of the plaintiffs without stating that these explanations were true is not a retraction.

Mr. Faulkner: May I say a word, Your Honor?

The Court: Yes.

Mr. Faulkner: That was never intended, that the retraction in effect would imply that the published material was wrong or that they were taking it back or retracting it. That is not a retraction but an explanation.

The Court: Oh, I am referring now not to this publication of the next day. That is what I understood this Instruction No. 9 relates—oh——

Mr. Faulkner: No. I think it does relate——

The Court: Oh, I am speaking now of the second paragraph—"that defendant opened its columns to plaintiffs on the same day."

Mr. Faulkner: Isn't that in No. 8?

The Court: I am, I thought, reading from No. 9.

Mr. Faulkner: Pardon me; oh, yes; the second paragraph. Excuse me, Your Honor.

The Court: Yes; that is what I am referring to. It [589] is that such does not constitute a retraction, if that is what is intended, unless the truth of those statements are admitted. The first paragraph of No. 9 is, as previously stated, covered by other instruction.

Mr. Faulkner: That covered the explanation.

The Court: Yes; that is the next day; the first paragraph.

Mr. Faulkner: Do I understand the Court will give that or not, that first paragraph?

The Court: Oh, yes; the jury will be instructed that they should take this statement into consideration, especially in the matter of damages.

Mr. Faulkner: And, in the other matter, it is controverted and it is a matter for the jury, the second paragraph, as I understand it.

The Court: Well, no. The point is that the second paragraph, Mr. Faulkner, that this explanation published in the columns of the paper on the same day would not be a retraction——

Mr. Faulkner: Oh, no.

The Court: ——unless the truth of those things were admitted. Naturally, the jury may take it into consideration.

Mr. Faulkner: Yes.

The Court: Yes.

Mr. Faulkner: But what I meant, Your Honor, was [590] that there was a conflict of evidence, which I did not contemplate at the time I drew this, as to whether these statements were made by two of the plaintiffs on that day. That would be a question for the jury if they want to deny that they made them. That would be a question for the jury, wouldn't it?

The Court: Well, yes.

Mr. Faulkner: Yes. So, may I say this? In fairness to Mr. Roden, he said that he did not; Mr. Metcalf, I think, said he did; but Mr. Roden said he didn't. So, there is a question there for the jury.

Mr. Kay: Mr. Metcalf merely said he was interviewed, but he didn't admit the correctness of the——

Mr. Faulkner: That is right; he didn't.

The Court: Well, we will check that a little further to see if we have it substantially covered.

Mr. Faulkner: I think that would be a question for the jury.

The Court: No. 10—I think we have already covered that with regard to the check. I do not propose to comment at all upon this matter of the check, except to instruct the jury that they can consider the headlines as well as the articles and any imputations arising therefrom. I do not think I should comment particularly on that item. It isn't the province of the Court.

Mr. Faulkner: Your Honor, I think I am off the track [591] here. What is that one?

The Court: No. 10, with regard to the check being placed in a prominent place on the front page.

Mr. Faulkner: Do we have that in there?

The Court: Wait a minute.

Mr. Faulkner: My No. 10 is different.

The Court: I have my notes wrong here; oh, beg pardon; I had my notes wrong; I mean, I was looking at the wrong notes. I meant merely that I was to check that a little further. I think that that instruction is substantially covered, and I meant by my note here to check it a little further; if not, it will be covered.

No. 11 I find also is substantially covered; and, especially the next to the last paragraph on Page 2, I think that is the law with reference to the right of an individual being the same as a corporation or the same as a newspaper. I find no difference.

No. 12, with regard to fair comment and the question of privilege, is granted in substance.

No. 13, the matter of the facts set forth in the publication, had not been fully covered, but it will be covered, although the language of the first paragraph here I think must be denied, but it will be covered so far as I find the law to be applicable. The second paragraph is substantially granted, or granted in substance; and, likewise, the next [592] paragraph, except this language: "The fact that the criticism may be fantastic is immaterial, and the extravagant form of its expression is unimportant." That portion is denied.

Mr. Nesbett: "And the extravagant"——

The Court: "And the extravagant form of its expression is unimportant." I do not think that is the law. And, as to the last paragraph on this page, No. 13, that is denied, because I do not find the rule here applicable, that is, where there is an attempt to wrench a word or a phrase out of an article and call it libelous. I do not find that applicable here.

Instruction No. 14, the matter of the definition of a crime is, I think, sufficiently covered. The matter of the definition of the crime of embezzlement of public money is fully covered, and I propose that the jury should be entitled to the language of this section in full in order that they may fully understand that issue. I cannot find that the last paragraph there is a correct statement of the—well, not a correct statement of the law, but is appropriate or justified, and that last paragraph then must be refused.

No. 15 is covered by other instructions as to what comments are fair comments and the matter of privilege and also covered with regard to the issues in the complaint and answer as to damages, likewise as to punitive damages and as to malice. Here is a question here that I would like to be [593] considered right at this time. Perhaps—I do not find it here—perhaps it is in a later one, Mr. Faulkner, where you referred to the fact that the plaintiffs Roden and Metcalf do not claim punitive damages. That is corrected by amendment.

Mr. Faulkner: That can be taken out, Your Honor, because I wrote that before the amendment was made.

The Court: I thought it was in here, in your Requested Instruction No. 15, but at the moment I do not find it.

Mr. Faulkner: No. I think that was later.

The Court: Later, I think; yes. We will take it up when we come to it then. As to the matter of the granting of exemplary or punitive damages only where there is evidence of actual malice or a reckless disregard of plaintiffs' rights, that is granted and is covered by instruction.

No. 16, the first paragraph is covered by standard instruction. The next paragraph is denied with respect to legal malice by reason of the presumption arising from an imputation of crime. It is granted as to actual malice. That portion of the requested instruction, the last two paragraphs, with relation to the defendant, that there is no allegation in the complaint that the defendant did not believe these statements were true and that the law presumes, raises a presumption of good faith, I do not think that that is the law, particularly where there is a presumption of malice, and that portion is denied. [594]

No. 17 is a standard instruction and is given—rather, the first paragraph. The second paragraph, I think, is sufficiently covered.

No. 18, the first two paragraphs are covered by standard instructions. The third is denied for the reasons previously assigned. As to the remainder, with regard to production of records, I cannot see that such an instruction is justified, where the evidence here showed without controversy, as far as

I could hear it, that an effort had been made to produce the records. The defendant itself produced all manner of certificates showing that search had been made and they could not be found. Then, how can we tell the jury that there is some grave fault in these officials for not producing the checks; and I will not so instruct the jury.

No. 19 is covered by standard instruction.

No. 20 may be proper, but I find it is wholly unnecessary. I don't think there is any such issue, and, therefore, it is not relevant. I don't think it is necessary to instruct the jury that expediency and convenience are no excuse for violation of the law. I see no reason for such instruction.

No. 21, which explains the statutes under which Oscar Olson was convicted and sentenced, is substantially covered by another instruction, which I think should be explained to the jury.

No. 22 is covered, I think almost exactly as set [595] forth here by Judge Yankwich, or at least in substance.

No. 23, and again on the matter of fair comment, is substantially covered by the instructions, except for the last paragraph which is refused.

No. 24 is denied for the reason that I do not believe that it is established as a matter of law that, if the statements of fact are true, that we can disregard the comment, because the comment is just as much a part of the publication as the statement of fact, so I cannot instruct the jury that, if the facts are substantially true, the right of fair comment is a complete defense as to any comment, and that

instruction will be refused. That is covered with regard to what is fair comment and what is not by the instructions prepared.

No. 25, with respect to the violation of the provisions of Chapter 133 of the Session Laws of 1951, is covered, so far as I find need be done, by the instructions prepared, except as to the last sentence, in which the Court is asked to instruct the jury that the setting up of the fund in the Behrends Bank and payments therefrom were in violation of the laws of Alaska, which is refused. That, again, is a question for the jury.

No. 26 is denied for the reasons already assigned, because we cannot say that comment in an editorial is privileged because it is only the writer's opinion. That is not privileged and is denied. [596]

No. 27 is denied for the reasons previously assigned. I cannot understand the quotation here from the Restatement of the Law of Agency that a person—"If an agent is appointed to perform an illegal act, and he does so, the one appointing him is responsible criminally." I think that is a rather broad statement. He would not be responsible criminally unless he were an accessory in some manner; then of course he would be responsible. But I do not find such requested instruction to be applicable here, and it is denied.

No. 28, with regard to the authority to operate the ferry at all or purchase it, is denied for the reasons already stated by the Court, except this, that the last portion, that the law is applicable—"all laws applicable to the receipt and disbursement

of public funds" may be applied to the ferry fund —that is of course obvious, and I think it is substantially covered—well, not obvious—there is no other means—no—I did not read this too carefully. The last sentence—"Notwithstanding the fact that there was no authority in law to purchase the ferry," which we have already ruled upon, "having used Territorial funds for that purpose and having used Territorial funds in the operation of the ferry, all laws applicable to the receipt and disbursement of public funds should have been applied in the handling of these monies." Again, that is a matter of very considerable dispute here and a difference of opinion between even the Attorney General and the Assistant [597] Attorney General, and I am not going to so instruct the jury. One Attorney General seemed to think it was all right, and one of the Assistants seemed to think it was not, and one former Attorney General thought it was. I am not going to instruct the jury as to whether it was or was not applicable.

No. 29 is denied because it is not applicable, although it is a correct statement of law.

No. 30, with regard to specific questions to be answered, I have been debating that question. I would like to consider it further. Generally, in cases of this kind I think the Court should try to avoid this type of verdict if it can. I would like to hear from counsel for the plaintiffs as to their views as to the special forms of verdict.

And, also, I still didn't find the reference, somewhere, to the matter of punitive damages with ref-

erence to plaintiffs Roden and Metcalf. I would like counsel for the plaintiffs to state to the Court whether or not it would not be proper for the Court to instruct the jury that no question of punitive damages should be considered as to these two plaintiffs on the matter of actual malice. Has there been actual malice shown as against Roden and Metcalf?

Mr. Kay: I believe so, Your Honor. In that regard, from this point of view, of course actual malice is something that is hard to produce direct proof on. However, we have shown, I believe, rather conclusively by the many extensive [598] exhibits that the animosity, or at least we hope that we have proved—we offered evidence that the animosity against the Governor extended to those who co-operated and worked with him and were members of his administration. And on the question of actual malice——

The Court: They were not specifically named. There was some talk about a Gruening machine, and then I think Mr. Small particularly denied that there was any such thing.

Mr. Kay: They have been named specifically of course in these series of articles, and then they follow up, which is introduced in evidence, refers to them——

The Court: Well, I did not have an opportunity to read all of these exhibits other than what you read to the jury.

Mr. Kay: All that I was going to point out in that regard was that after this publication and a

few days later an editorial was published, which is in evidence: "Attempts to silence Alaska's free press through intimidation took a new turn last week as Ernest Gruening and two administrative satellites brought civil suits against the Daily Alaska Empire in the sum of $300,000." And then it went on: "the Empire's publisher herewith informs Dr. Gruening that she is not and will not be frightened by his political antics nor those of his cohorts."

Now, I feel that there is sufficient evidence of [599] actual malice to justify the imposition of punitive damages if the jury is to believe that this vindictive feeling, if such existed, against the Governor extended to those in his administration closely co-operating with him. But in any event, Your Honor, may I point out that, as Your Honor has said, that this is a libel per se. Malice is, therefore, presumed, and——

The Court: That is legal malice.

Mr. Kay: The legal malice——

The Court: I am speaking of punitive damages.

Mr. Kay: ——in a libel per se——

The Court: Therefore, to assess punitive damages, surely, there must be an actual malice.

Mr. Kay: I believe not, sir; I think not according to the law. If there is a libel per se, particularly in the case of criminality, I think that that libel is sufficient to support a——

The Court: Well, let me correct that please. Either that there must be actual malice or that the act was done wantonly and recklessly, without regard to the right of plaintiffs. So that in that re-

spect there is an issue as to whether there was a wanton or reckless act without regard to the right of those plaintiffs, and, correcting myself then, with that view I believe that the issue should be submitted to the jury.

Mr. Kay: I believe so, Your Honor. [600]

Mr. Faulkner: Your Honor please, in that connection, in writing these proposed instructions of the defendant's I attached to them, as the Court has noted and stated, a special form of verdict, that is, certain specific questions to be answered. In doing that I have followed the procedure in the Golden North case. It is very difficult, I imagine, for a jury to decide a libel suit without doing that.

Now, in preparing this special verdict, you may notice in these instructions I have proposed there and gave you, I have given you only one set of verdicts. I have given you only one for Governor Gruening, and the reason I didn't give the other two was that I had them written out but, since they added the malice allegation in the complaint, I had to rewrite them and add or make them exactly the same as the other, and I will have those here in the morning. They are done, and I just forgot to bring them up at noon. I did them last night. So, your file, in other words, is not complete until I bring those other two sets for the Court to rule on. That will be done.

The Court: I would like to hear from counsel for plaintiffs; what is your suggestion with regard to these special forms of verdict?

Mr. Nesbett: Your Honor, we haven't studied them.

The Court: I don't mean special forms. I mean specific questions. [601]

Mr. Nesbett: First of all, we object to asking for special findings because it does nothing but confuse the jury. There is nothing unusual about this case that would make it different from any other libel or slander case where the only matters to instruct upon must be determined and then the question is, if such and such a determination is made, whether they are entitled to damages and how much. There is room for two findings, compensatory and punitive damage, and I can't see anything that separates this libel suit from the ordinary run of the mill libel suit in connection with the instructions or the form of the verdict.

Now, I can see where putting six questions to the jury with parentheses, for example, under No. 1: "(If you have answered 'Yes' to question No. 1, then you should not answer any of the remaining questions; but if you have answered 'No,' then answer Question No. 2.)"—and then it goes on down and gets so involved that you are running the sheets back and forth, and, as I say, Your Honor, it does nothing but confuse, and it would result, if this were anything in the way of a peculiar type damage suit, or, rather, libel suit, then the matter of damages might become more involved, but it is not, and it should be kept simplified just as we attempt to keep the instructions as simplified as possible. Those are our opinions on the matter.

Mr. Kay: I would just like to add—I can see why [602] and how in, perhaps, a case where it is not libel per se and there was innuendo, it would be considerably to the plaintiff's advantage in such a case, and I wouldn't blame him for asking for it, to ask a number of questions in the hope that the jury might come up with a conflict between the answers and, therefore, vitiate their findings and require a new trial, and I think that that possibility would always exist here because it is going to take a lot of study on the jury's part to go back and forth all the way through these questions, whereas, basically, the question in this case is rather simple —were these plaintiffs libeled, as instructed by the Court, and, if so, what actual damages are they entitled to, and, if they are entitled to any punitive damages, what amount of punitive damages are they entitled to? Therefore, we very strongly oppose the giving of any series of six questions in arrival of a verdict. It is a rather peculiar form of verdict in any event. I should think that, if the Court were to submit anything and propose anything but a general verdict, it might submit a series of questions in addition to a general verdict or interrogatories in addition to a general verdict; but this purports to be a form of verdict.

The Court: No doubt it is a question for the discretion of the Court: I rather hesitate to do it because I feel, too, that it would only cause confusion. I do know that the last time I attempted something similar to it the jury [603] returned with their verdict, and after they had been discharged

both parties turned to me and said, "If the Court please, who won?" And I said, "I do not know." And I didn't know. And it is a whole lot simpler, I think, to let the jury decide whether the defendant is liable and, if so, how much. I do not believe that it would be wise to give such specific questions.

Mr. Faulkner: If the Court please, in submitting this to the Court I followed the Golden North case in which they did that—only they submitted, I think, more questions—and that procedure was largely based on Coleman v. MacLennan, in which they submitted a dozen questions, and the Court held that to be proper, and I think those two are our leading cases on libel.

The Court: Oh, I think it would be proper, Mr. Faulkner, but I think it is a question for the discretion of the Court, whether it would be wise.

Mr. Faulkner: It is very difficult to submit a general verdict to a jury in a case of this nature, as is usually done, and I find in my examination of the authorities what is usually done in libel cases—first, whether the publication was libelous within the language of the Court's instructions, whether it was libelous per se, if the truth were established, whether the comment was fair, and then whether there was any malice; and that is very essential. You should [604] get a general verdict whether it is based on malice or what it is based on.

Mr. Nesbett: I think counsel is mistaken. I have seen a number of libel suits in Alaska and been involved in them and I have never seen it done, nor in slander. Furthermore, according to Mr. Faulkner's remarks that Coleman v. MacLennan is a lead-

ing case on libel, apparently, I don't think he is quite correct. He made the remark this morning that that case had overruled Scott v. Times Mirror, which I had cited. Actually, it is the reverse. Coleman v. MacLennan is reported in 84 Pacific, whereas Scott v. Times Mirror is 184 Pacific, a much later case and is a leading case, and, as I say, cited in many, many, many of the cases which deal with the points that we are concerned with here on libel.

Mr. Faulkner: I think counsel misunderstood me this morning. That isn't what I said. I said it was our Court of Appeals in a very recent case, the Golden North Company, referring to this Coleman v. MacLennan case as a leading case, and said that, while it was overruled in a certain case or two, that the Courts have gone back to it, and that is now the law. That is what the Court of Appeals said about it, not what I am saying about it.

Mr. Nesbett: That isn't what my notes say.

The Court: There is no need of prolonging this argument, I think. I do find that the law of libel is not as [605] simple as some people may think.

Mr. Kay: That is for sure.

Mr. Nesbett: Your Honor, I gave you a hand-written instruction, Proposed No. 12, regarding and concerning the articles as a whole. Did you say that was covered?

The Court: Oh, yes. I neglected to attach that here, but I will. I have it here some place.

Mr. Nesbett: Is it covered?

The Court: It is covered; yes, sir.

(Whereupon, Court was adjourned until 10:00 o'clock a.m., November 19, 1955, reconvening as per adjournment, with all parties present as heretofore and the jury all present in the box; respective counsel were furnished copies of the Court's Instructions to the Jury; whereupon, Mr. Kay made the opening argument to the jury on behalf of the plaintiffs; Mr. Faulkner commenced the argument to the jury on behalf of the defendant; and thereupon, the Court recessed until 1:30 o'clock p.m., November 19, 1955, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; whereupon, Mr. Faulkner concluded the argument to the jury on behalf of the defendant; Mr. Nesbett made the closing argument to the jury on behalf of the plaintiffs; the Court read his Instructions to the Jury; and the following occurred:)

The Court: Now, if counsel for either party wish to interpose objections to the Instructions, will you please [606] approach the bench?

(Whereupon, after conference at the bench between Court and counsel, the jury retired from the courtroom; and the following occurred:)

The Court: We will hear then from the plaintiffs as to any exceptions. The Court will not entertain any argument upon these exceptions. You may state them.

Mr. Nesbett: The plaintiffs except to Instruction No. 5, Your Honor, commencing with the words "The statute" on Line 12 and continuing to Page 11, through Line 5, upon the ground that quoting the entire statute under which the Territorial Treasurer was sentenced is confusing in connection with the Instruction No. 5 as a whole and when read in connection with the other instructions. I think, for one thing, it has been fully covered.

The Court: Is that the only one?

Mr. Nesbett: That is all; yes.

The Court: As we have stated previously, the Court on ruling on the motion for judgment for the defendant, we found it necessary to quote this full statute to the jury in order that they can fully understand what constitutes embezzlement. Such quotation surely cannot be prejudicial to the plaintiffs, and I do not find it confusing. I think it is necessary, in view of the issues here, that the jury knows exactly what the crime of embezzlement is. The objection is [607] overruled, or exception denied.

Mr. Faulkner: That is all you have?

Mr. Nesbett: That is all; yes.

Mr. Faulkner: Then the defendant wishes to except to portions of Instruction No. 3, beginning with Line 9 of Page 1 of that Instruction, to and including the words "damage resulted" on Line 14 of the same page—Line 16—pardon me—no—14.

The Court: That is with reference to libel per se.

Mr. Faulkner: Line 14; that is right; Line 14; yes; that is it. And then to the last paragraph of this Instruction, Line 31, on Page 1——

Mr. Nesbett: I can't hear you, sir.

Mr. Faulkner: Line 31. The last paragraph, beginning on Line 31, Page 1 of this Instruction; that would be Page 6 of all of the Instructions. The Instructions are paged. It would be Page 6 of the entire Instructions.

Then the defendant excepts to the entire first paragraph of Instruction No. 4, ending on Line 16; the paragraph ending on Line 16 of Instruction No. 4, which is Page 8 of the Instructions.

And then the defendant excepts to that portion of Instruction 5, beginning Line 12, Page 2 of the Instruction; beginning Line 12 of Page 2, which——

The Court: That is the same one that the plaintiffs [608] objected to.

Mr. Kay: I was going to say we better withdraw our objection, Your Honor.

Mr. Faulkner: How is that?

The Court: That is the same one that the plaintiffs objected to.

Mr. Faulkner: No.

The Court: You said No. 5, beginning at Line 12, Page 2.

Mr. Faulkner: Page 2 of that Instruction.

The Court: Page 2—oh, beg pardon; my error; Line 12, Page 2.

Mr. Faulkner: Page 2 of that Instruction.

Mr. Nesbett: That is Page 11, Line 12.

Mr. Faulkner: Page 11; that is right; Line 12, the words: "Further that the deposit of any such funds in a bank subject to be withdrawn by check does not constitute in law a loan of such funds."

And then, again, in Instruction No. 5, beginning at Line 16, Page 2 of that Instruction and Page 11 of the whole, beginning with Line 16, at the beginning of it, down through the word "prosecution" on Line 21. And defendant objects to the whole of Instruction No. 6—no; I haven't finished with 5; excuse me, Your Honor. And to Instruction No. 5, that portion contained on Page 12, beginning at the top of the page, above Line 1, with the words "No penalty," [609] down to and including Line 15, the words "disqualification from office."

And then to the whole of Instruction No. 6.

The Court: Well, you object to the language that "No penalty is provided for violation"——

Mr. Faulkner: Yes.

The Court: Do you find any?

Mr. Faulkner: Well, no, Your Honor, but——

The Court: I certainly wasn't able to. I searched and searched and I couldn't find any.

Mr. Faulkner: No. If you want my theory, I will give it to Your Honor.

The Court: Well, I see. You don't mean any express penalty.

Mr. Faulkner: No. I don't mean any express penalty in those statutes. I meant that the penalty was over in the other statute.

The Court: Yes; I had in mind that was your theory.

Mr. Faulkner: Then to Instruction No. 6, as that would be inconsistent with the ruling of the Court rejecting Mr. Homer's testimony or sustaining objection thereto.

Then the defendant objects to Instruction No. 7 in its entirety.

And No. 8, paragraph 1, the entire paragraph 1 in Instruction No. 8 on Page 16, and paragraph 3—oh, no; pardon [610] me. I think that paragraph 3 is covered in your next paragraph there.

The Court: Do you object to all of No. 8?

Mr. Faulkner: No. The first paragraph of No. 8.

The Court: I mean, all of that paragraph?

Mr. Faulkner: All of that paragraph.

The Court: You object to the words: "The truth of the words complained of is an absolute defense to an action for libel"?

Mr. Faulkner: Well, no; I don't object to that; no, Your Honor. I am mixed up on that. That isn't it; no. From the words "To be" on Line 6 of Instruction No. 8.

The Court: I see.

Mr. Faulkner: Thank you for calling my attention to that.

Now, I think that is all, excepting I have one or two here that I think were included in my instructions. Let me go over these for a minute and see if they were included.

The Court: I think exceptions were already taken, were they not, for refusal to grant the requested instructions?

Mr. Faulkner: No; I don't think so, Your Honor. No; I don't think I did, did I?

Mr. Kay: I think it is understood. If not, I would stipulate, as to both sides.

The Court: Without enumerating them, those exceptions [611] are certainly allowed, for refusal to——

Mr. Faulkner: Well, I have only a few here, Your Honor, and I think that——

The Court: I really don't think it necessary to enumerate them. They are all in the record. As a matter of fact, I have made notes on each one. Exception to the refusal of the Court to grant any of the defendant's requested instructions, which were refused, is allowed.

Mr. Faulkner: That will take care of it.

The Court: And the same for the plaintiffs.

Mr. Faulkner: Yes. Now, I think, one more exception. We have got to state the grounds for these exceptions. I think that they do not state the law of libel as it exists today under the laws of Alaska and the decisions of the courts. I can't go into it any more than that without bringing out a lot of argument on cases. But I would like to make one more exception, and that is to the refusal of the Court to submit to the jury the verdict containing the special findings. That is all.

The Court: Well, with regard to the defendant's exceptions, I think practically all of these same objections were made and disposed of on the ruling of the Court on the motion for directed verdict and for which reason the exceptions are denied. However——

Mr. Faulkner: And would you—— [612]

The Court: Just a moment. That is true as to No. 3 in which we define the crime of, or define as to what is libelous per se; I do not see how that could be objected to; I think that is a correct statement of the law; that is a mere definition; as to the last paragraph with regard to malice, the distinction between legal and actual malice.

No. 4, in which the Court instructs the jury that there was here an imputation of crime, I am satisfied is correct and that the Court has that duty, much as I would like to avoid it.

And No. 5, I think that is also covered by previous rulings in the case. I cannot find that the statute, which I quoted to the jury in order that they may fully understand it, has any application to the illegal receipt and disbursement of public funds, which is referred to in the main part of these articles.

No. 6, we have previously discussed, except that counsel felt that we have limited the instruction to the previous finding. If the jury finds from the evidence that the publication complained of is, actually charged or imputed to the plaintiffs the crime of embezzlement, it is limited to that, and I think is a correct statement of law.

No. 7, we have already discussed, and I am still convinced that any such evidence, relating to the handling of this money by Mr. Coughlin, the purser, is not relevant. [613]

Instruction No. 8 I think we have previously—no—we have not previously fully discussed it. I find no

fault with which I am aware of the definition of the law with regard to the truth of the publication and the law with respect to privileged communications.

As to the matter of special questions or special form of verdict, again I feel that such would not be proper here and, particularly, the forms of verdict as submitted by the defendant, which we should not consider to be submitted to the jury in this case, because counsel follows the theory, which the Court does not adopt at all, that, if the facts, what you call the facts, are true, then there is no libel and that you can say anything that you want by way of comment, and that, we find, is not the law. Comment also must be honest and fair, as well as facts, and for that reason especially, the questions which you propose to put to the jury would not be proper at all.

Do you have anything further, Mr. Kay?

Mr. Kay: Your Honor, on the question of the verdict, naturally, frankly, Mr. Nesbett has been absent from his office for a long time, some three weeks, because he was absent in Seattle prior to coming directly to Juneau and then to Ketchikan on this trial, and I have been gone about ten days; if the jury were to come in and return a verdict almost any hour of the night, I know for myself I would be very glad [614] to receive it so that we could depart Ketchikan tomorrow. I promised I would be in my office on Monday.

The Court: Well, you don't have to be here, do you, Mr. Kay? Couldn't you assign somebody here to——

Mr. Kay: I presume so, but I do not like to run out before they return a verdict.

The Court: I do not like to keep the whole staff waiting. I don't mind it myself.

Mr. Kay: Of course they wouldn't have to wait.

The Court: To have the whole staff wait after 11:00 o'clock is not right.

Mr. Kay: Very well, your Honor.

Mr. Faulkner: Then we understand, your Honor, that, where the Court yesterday did not give the instruction proposed by the defendant, it is considered that an exception is taken to that at that time.

The Court: Oh, yes. You may call in the jury, please.

(Whereupon, the jury returned and all took their places in the jury box; and the bailiffs were duly sworn to take charge of the jury; and the following occurred:)

The Court: I might state, in case you do not understand it, by leave of the Court you are also permitted to take any message from any juror if they want to communicate with their family or something like that of course. The jury may retire to consider their verdict. [615]

(Whereupon, the jury retired to the jury room at 4:30 o'clock p.m. in charge of the bailiffs to consider their verdict.)

(Thereafter, on the 21st day of November, 1955, at 10:00 o'clock a.m., at Ketchikan, Alaska; the Honorable Walter H. Hodge, United States District Judge, presiding; the plaintiffs attor-

neys appearing by W. C. Stump and E. E. Bailey, attorneys at law; the defendant appearing by H. L. Faulkner, its attorney; the sealed verdicts of the jury in each of the above-entitled causes were received, read in open court, and ordered filed; and thereafter the following occurred:)

Mr. Faulkner: If the Court please, is the reporter here?

The Court: Yes.

Mr. Faulkner: In the case of Gruening, Roden and Metcalf against the Empire Printing Company, first, I should like to have added to the name of counsel for defendant the name of Roger G. Connor, in our office, because I will be away and there may be some further proceedings. And I also wish to state, so that we can clear the record—it has nothing to do with the jury's verdicts—Mrs. Monsen was asked about the assets of the corporation, and she testified; now, my recollection of her testimony is that she testified there was a lot at Salmon Creek worth $500.00 and a car and some miscellaneous [616] little stocks and bonds, and I want to state to the Court—those were distributed in August; they were not assets of the corporation at this time. I wanted to state that. I don't know whether the testimony makes that clear, but that has nothing to do of course with the trial and the verdicts in the case. And, another thing, I would like to be heard, when counsel prepares a form of judgment I should like to be heard on that, and I suppose that will be sometime hence, or have an opportunity to look it

over first before the Court signs it, so that, if we have any objections, we might make any objections to it.

The Court: Oh, surely.

Mr. Faulkner: I just call that to the attention of the Court: I assume that they would send us a copy and send you the original, and we will be in Juneau and are rather handicapped by having the attorneys for the plaintiffs in Anchorage, but if they send it to us in time, but if they don't—they probably might send it to the Court first; I don't know. They have done that before. I don't accuse them of doing it deliberately, but, perhaps inadvertently, they have called matters to the attention of the Court that we didn't know anything about, and it didn't do any harm, but in this case I would like it to be understood that we would have an opportunity to see the proposed judgment and to file any objections to it. [617]

The Court: It has been my practice, Mr. Faulkner, not to enter a judgment in a jury case, nor findings of fact and conclusions of law or judgment in a nonjury case, unless the form of the judgment is approved by opposing counsel or if it is lodged with the Court for at least three days.

Mr. Faulkner: We will do that very promptly when we receive it and know what it is.

The Court: Yes. So that that practice will be followed, and you will be given an opportunity to object of course to the judgment. That would be only as to form, however.

Mr. Faulkner: That is right. Then, your Honor,

when the Court adjourns here, I assume these records will be taken back to Juneau where the case was filed?

The Court: Oh, yes.

(End of Record.) [618]

United States of America,
Territory of Alaska—ss.

I, Mildred K. Maynard, Official Court Reporter for the hereinabove-entitled Court, do hereby certify:

That as such Official Court Reporter I reported the above-entitled causes, Nos. 6725-A, 6726-A and 6727-A of the files of said court;

That I reported said causes in shorthand and myself transcribed said shorthand notes and reduced the same to typewriting;

That the foregoing pages numbered 1 to 618, both inclusive, contain a full, true and correct transcript of all the testimony and proceedings at the trial of the above-entitled causes, to the best of my ability.

Witness, my signature this 24th day of March, 1956.

/s/ MILDRED K. MAYNARD,
Official Court Reporter.

[Endorsed]: Filed May 24th, 1956.

CLERK'S CERTIFICATE

United States of America,
Territory of Alaska, First Division—ss.

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the hereto-attached pleadings are the original pleadings and all Orders of the Court filed in the above-entitled cause, and constitutes the entire file in said cause as designated by the Appellant to constitute the record on appeal herein.

In Witness Whereof, I have hereunto set my hand and caused the seal of the above-entitled court to be affixed at Juneau, Alaska, this 26th day of March, 1956.

/s/ J. W. LEIVERS,
Clerk of District Court.

[Endorsed]: No. 15052. United States Court of Appeals for the Ninth Circuit. Empire Printing Company, a Corporation, Appellant, vs. Henry Roden, Ernest Gruening and Frank A. Metcalf, Appellees. Transcript of Record. Appeal From the District Court for the District of Alaska, First Division.

Filed: March 1, 1956.

/s/ PAUL P. O'BRIEN.
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 15052

EMPIRE PRINTING COMPANY a Corporation,
Appellant,

vs.

HENRY RODEN, ERNEST GRUENING and FRANK A. METCALF,
Appellees.

APPELLANT'S REQUEST THAT THE COURT CONSIDER ON APPEAL THE ORIGINAL EXHIBITS WHICH ARE NOT PRINTED

Comes now the appellant, Empire Printing Company, a Corporation, by its attorney H. L. Faulkner, Esq., and requests the Court to consider on the hearing in the above-entitled cause all exhibits introduced in the trial of this cause in the Court below and that they be considered without the necessity of printing them in the record, except such exhibits as have been printed, or requested to be printed.

This request is that the following mentioned exhibits be considered without the necessity of printing, namely, plaintiff's-appellant's exhibits numbers 1 to 7 and 10 to 14, inclusive, and defendants'-appellees' exhibits numbers A, B, D, F, G, H, I, J, K, L, M and N. This request is made for the reason that the exhibits are largely newspapers and newspaper clippings and that it would require a very great additional expense to print them and it would make the record unduly long.

Dated at San Francisco, California, March 6, 1956.

/s/ H. L. FAULKNER,
Attorney for Appellant.

[Endorsed]: Filed March 7, 1956.

In the United States Court of Appeals
for the Ninth Circuit
No. 15052

HENRY RODEN,
Plaintiff,
vs.
EMPIRE PRINTING COMPANY, a Corporation,
Defendant.

ERNEST GRUENING,
Plaintiff,
vs.
EMPIRE PRINTING COMPANY a Corporation,
Defendant.

FRANK A METCALF,
Plaintiff.
vs.
EMPIRE PRINTING COMPANY a Corporation,
Defendant.

CONSOLIDATED CASES

STATEMENT OF POINTS TO BE RELIED UPON BY APPELLANT ON APPEAL

Appellant proposes on its appeal to the United States Court of Appeals for the Ninth Circuit in

the above-entitled causes, which have been consolidated, to rely on the following mentioned points as error:

1. The court erred in holding and ruling, and instructing the jury, that since 12-2-1, ACIA 1949, did not provide any criminal penalty for its violation and that therefore plaintiffs could not lawfully have been charged with any criminal act for violation of that Section, no testimony could be introduced to show that any loss of public funds had occurred through appellees' violation of Section 12-2-1.

2. The Court erred in rejecting the testimony of Steve Homer under appellant's offer of proof and which testimony was offered to show a loss of public funds and which loss resulted in a violation by appellees of Section 12-2-1, ACIA 1949, and all other testimony of appellant tending to support the testimony offered through Steve Homer.

3. The court erred in holding that an agent's criminal acts cannot be imputed to the principal even where the agent is appointed to perform an illegal act. (In this case the appellees admitted that they violated Section 12-2-1, ACIA 1949, and appellant offered to show a loss of public funds resulting from this violation of the law and that the loss of public funds was a violation of Section 65-5-63, ACIA 1949.)

4. The court erred in holding that the violations by appellees of Section 12-2-1, ACIA 1949, was not also a violation of Section 65-5-63, ACIA 1949.

5. The court erred in instructing the jury that the articles published by appellant, which are the basis of the action, constituted libel per se.

6. The court erred in holding that the canceled checks issued on the special ferry fund were immaterial and that their loss by the appellees or others who had them in their possession was immaterial in these cases.

7. The court erred in holding that bank deposits and checking accounts do not consitute a loan, creating the relationship of debtor and creditor between the bank and the depositor.

8. The court erred in admitting in evidence, over the objection of appellant, a printed copy of a letter purported to have been written by Fred McGinnis (Plaintiffs' Exhibit No. 8).

9. The court erred in giving that portion of Instruction No. 3 which reads as follows:

> "You are further instructed that any such publication which imputes to the person referred to the commission of a crime is libelous per se, that is, a libel in and by itself; and where the matter published is libelous per se, the law presumes that it was published maliciously and that damage resulted. It is also the law that it is libelous per se to falsely impute to a person in his capacity as a public officer, fraud or dishonesty in the conduct of his official duties; and any libel affecting him in his official capacity and of such nature that, if true,

would be cause for his removal from office, is actionable per se.

"These presumptions of law make it unnecessary for the person to whom the commission of crime is imputed to prove malice or injury; but he may nevertheless make such proof for the purpose of showing the extent or degree of malice and of the injury and damage to his reputation and for the purpose of enchancing his recovery."

10. The court erred in giving Instruction No. 6 and particularly that portion of it which reads:

"the defendant must show by a preponderance of the evidence that plaintiffs handled the money wrongfully and fraudulently and with a criminal intent to convert such to their own use."

11. The court erred in giving Instruction No. 7 where the court instructed the jury to disregard all testimony regarding the loss of public funds as not relevant to the issues involved and which instruction is based on the fact that appellant did not mention a loss of funds in the publication of September 25, 1952, and that therefore the loss of public funds was not an issue in the case and therefore was not relevant to the truth or falsity of the publication. In this connection defendant's proposed Instruction No. 22 was offered to the effect that the truth, whenever discovered, is a complete defense in a

libel action. The court erred in denying that instruction.

12. The court erred in giving to the jury Instruction No. 4 and particularly paragraph one thereof.

13. The court erred in giving a portion of Instruction No. 5 and particularly that part of it which reads as follows:

> "You are further instructed that aside from the statutes above noted defining the crime of embezzlement of public funds, there is no statute in Alaska making a violation of the law relating to the receipt and disbursement of public funds by Territorial officials a crime, or subject to criminal prosection."

14. The court erred in giving that portion of Instruction No. 5 which reads as follows:

> "Further that the deposit of any such funds in a bank subject to be withdrawn by check does not constitute in law a loan of such funds."

15. The court erred in giving Instruction No. 7 which reads as follows:

> "During the trial of this case considerable testimony has been received concerning the question of whether or not a shortage of money occurred in the handling of moneys in connection with the operation of the ferry 'Chilkoot' by the purser.
>
> "You are instructed to disregard all of such testimony as it is not relevant to the issues in-

volved. No shortage of moneys in the ferry operating fund is mentioned in the publication of the Daily Alaska Empire of September 25, 1952, and the question of whether or not such a shortage occurred is not made an issue in this case by the pleadings of either the plaintiffs or defendant, or is relevant to the question of the truth or falsity of the publication."

16. The court erred in giving the first paragraph of Instruction No. 8 for the reason that the rejection of the testimony offered to show the loss of public funds through the acts of appellees made it impossible for appellant to establish in detail the truth of the claim of loss of public funds so as to show the close parallel of the case to that of Oscar Olson. Furthermore, the court erred in stating that this was not pleaded whereas it was set forth in paragraph three, second affirmative defense.

17. The court erred in giving paragraph two on page two of Instruction No. 8, relating to retraction, as there was no retraction involved in the case.

18. The court erred in refusing to give defendant's proposed Instructions Nos. 4, 5, 6, 7, 8, the last paragraph of No. 9, No. 10, No. 11 with the exception of the last sentence thereof which the court did give, Nos. 12, 13, 14, 16, 18, 20, 22, 23, 24, 26, 27, 28, 29 and 30.

19. The court erred in submitting to the jury for its consideration the headlines in the publication of

September 25, 1952, entitled "Reeve raps graft, corruption."

20. The court erred in overruling appellant's motion for instructed verdicts and in permitting the cases to go to the jury.

21. The court erred in overruling defendant's motion for judgment notwithstanding the verdict or for a new trial, and entering judgment for plaintiffs.

Appellant prays that the record be printed in accordance with the designation of "Parts of Record to Be Printed," and as filed and certified by the Clerk of the District Court.

Dated this 23rd day of April, 1956.

/s/ H. L. FAULKNER,
Attorney for Appellant.

Affidavit of Mail attached.

[Endorsed]: Filed April 23, 1956.